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Water Policy
Committee to the
51st Legislature

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# REPORT OF THE WATER POLICY COMMITTEE TO THE 51ST LEGISLATURE OF THE STATE OF MONTANA

December 1988

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# REPORT OF
# THE WATER POLICY COMMITTEE
# TO THE 51ST LEGISLATURE
# OF THE STATE
# OF MONTANA

December 1988


Senator Jack Galt, Chair
Representative Dorothy Bradley, Vice-Chair

Representative Bob Marks
Representative Dennis Iverson
Representative Gary Spaeth
Senator Esther Bengtson
Senator Larry Stimatz
Senator Pete Story

Staffed by the Environmental Quality Council
Capitol Station
Helena, MT 59620
(406) 444-3742

# WATER POLICY COMMITTEE

## Montana State Legislature


**SENATE MEMBERS**

Jack E. Galt, Chairman
Esther G. Bengtson
Larry Stimatz
Pete Story

**HOUSE MEMBERS**

Dorothy Bradley, Vice Chairman
Dennis Iverson
Bob Marks
Gary Spaeth

**COMMITTEE STAFF**

Environmental Quality Council
Capitol Station
Helena, Montana 59620
(406) 444-3742


December 9, 1988

President of the Senate
Speaker of the House
Montana Legislature

Gentlemen:

As chairman of the Water Policy Committee, I am pleased to transmit the committee's final report to the Fifty-first Legislature, as required by section 85-2-105, MCA.

The committee devoted special attention this interim to Montana's water rights adjudication process. As contemplated by the special legislative appropriation, the committee hired a consultant with no conflict of interest to evaluate Montana's process to determine if it is legally sufficient. The consultant found that Montana's process is sufficient, though some fine-tuning legislation is offered.

The committee also monitored the state water planning process throughout the interim. The state water planning efforts may result in some policy recommendations. Therefore, our committee will convene a special meeting in early January to consider and make comment on the new plan elements and any proposed legislation.

Recommendations are also provided for the other statutory areas assigned to the committee. On behalf of the Water Policy Committee, I urge your consideration of this report.

Sincerely,

Jack E. Galt

Senator Jack E. Galt
Chairman

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## SUMMARY OF COMMITTEE RECOMMENDATIONS

The committee carefully considered each of the recommendations stated in this summary section. Readers are encouraged to refer to the body of the report for explanation concerning the recommendations.

### State Water Plan

1. The current process for determining plan topics should be continued, but with expanded effort to obtain public input concerning topic selection. Special consideration should be given to identifying feasible sites for water development, including sites for additional storage and conservation improvements.

2. The Department of Natural Resources and Conservation should continue to aggressively solicit public participation in all phases of its planning efforts. To ensure formal input in decision making, several public representatives (perhaps six members selected by geographic region) should be considered for membership on the State Water Plan Advisory Council. Finally, educational activities, informal meetings with organizations, and regional advisory councils should all be used to ensure ample opportunity for public input in even the earliest stages of plan development.

3. For this year's state water plan, the Water Policy Committee will review and make comment on the plan sections as approved by the Board of Natural Resources and Conservation. The 1989 Legislature may then by resolution adopt the state water plan sections, stating any conditions, exceptions or additions to the elements within the resolution itself. In future years, other options for obtaining legislative or other approval without BNRC consideration should be explored.

4. To ensure opportunity for detailed review by the legislative branch, the policy recommendations and proposed legislation resulting from preparation of plan sections should be formally presented to the committee prior to the general session. For this biennium, the committee contemplates a meeting early in the legislative session to review and comment on final plan sections and legislative proposals.

5. The planning process should continue for another biennium before a statutory council is considered.

### Water Development

1. The committee is philosophically firm on developing a strong water development program. The continuing decline of money available for the grant program (from $2.1 million in 1983, to $1.6 million in 1985, to $590,000 in 1987, to a proposed estimate of $39,000 in 1989) is objectionable. The committee

strongly encourages full funding to ascertain whether the program can achieve the objectives contemplated initially.

2. The water development grant program appears to have criteria in place that reflect the varying needs for water development in Montana.

Water Research

1. The committee endorses establishment of the Water Research Policy Advisory Board, though the board might be expanded to include three state agency representatives (appointed by the governor), three university system representatives, three legislative members, and three public members.

2. The present funding of $15,000 annually should be continued. In addition, the committee strongly encourages a university proposal for development of a stronger and more focused water research program, including a strategy for obtaining sufficient funding.

3. A more coordinated and aggressive educational effort should be undertaken with the Montana State University Cooperative Extension Service, state agencies, and the private sector.

Water Data Management

1. The NRIS water information system appears to be proceeding on schedule and should be funded as proposed through the 1990-92 biennium. Efforts should be undertaken, however, to investigate long-term funding scenarios.

Water Rights Adjudication

1. Temporary decrees should be specifically addressed by statute, with some modifications from the consultant's original bill. First, the extension of the objections period should be limited to two 90-day extensions for good cause shown.

Second, because temporary preliminary decrees may be administrable (see Recommendation 2), an objections and hearings process should be required. However, because objections and hearings will occur at both the temporary preliminary and preliminary decree stages, an objection that seeks to reopen and review any matter already litigated as a result of a previous objection process should not be allowed. The committee also acknowledges that an amendment may be necessary to provide an exception for federal and Indian reserved rights consistent with the present suspension of the adjudication process for these rights.

Third, the costs of notice by mail are so high as to render basin-wide notice impractical. Newspaper publication will accomplish the same objectives at acceptable costs.

2. The proposed legislation allowing for administration of all decrees is endorsed. However, the bill should be amended to provide for immediate and preliminary injunctive relief, thereby ensuring timely response to water controversies that arise during critical irrigation periods.

3. The proposal to require DNRC approval under the change in appropration right process is unnecessary, particularly given the fine-tuning recommended in the other proposed legislation. The adjudication process should be relied upon to deliver accurate decreed rights.

4. Correction of clerical errors in final decrees should be authorized by law.

5. The bill addressing the relationship between the prima facie status of claims and temporary preliminary and preliminary decrees is endorsed, though it should be included with the bill providing for the administration of decrees. However, because of the close relationship between this bill and the bill providing for administration of decrees, they might be considered as one bill. Also, a claim's prima facie status should not be superceded until the temporary preliminary decree has been modified after objections and hearings.

6. The reopening of decrees is recommended but with a limitation specifying that an objection that seeks to reopen and review any matter previously litigated as a result of an objection process is disallowed. The committee also acknowledges that an amendment may be necessary to provide an exception for federal and Indian reserved rights that is consistent with the present suspension of the adjudication process for these rights.

Two 90-day extension periods for objections are suggested, along with new language ensuring notice by newspaper publication to all persons with rights to water in the stream system.

7. No formal recommendation is made concerning how, or whether, the constitutionality of the water court structure should be addressed.

8. The committee affirms its support for existing adjudication priorities and the petition process, whereby persons who have filed claims in a basin can petition the water judge for priority adjudication.

9. The committee formally accepts the report by Saunders, Snyder, Ross and Dickson, P.C. on the water rights adjudication process.

The committee is supportive of full funding for the adjudication process, since the level of funding directly affects the rate at which the process can proceed.

Water Transfers

1. The committee elects not to make specific recommendations concerning water transfers, but notes that at its January meeting it will review and comment on any water transfer bill submitted with the state water plan sections.

# Introduction

This is the second biennial report of the Water Policy Committee to the Montana Legislature. The first report addressed eleven water policy areas in an attempt to provide a comprehensive overview of issues facing Montana. This interim report is more focused, and in particular devotes considerable attention to the water rights adjudication process.

Part One of this report addresses areas assigned statutorily to the committee: the state water plan, water development, water research, and water data management.[1] During the 1987-89 interim, several significant events occurred concerning each of these areas.

Part Two addresses two areas of special concern. The study of the water rights adjudication process involved an assessment by an out-of-state consultant of the legal adequacy of the process, as contemplated by the 1987 Legislature. Committee recommendations concerning the consultant's findings and proposed legislation are provided in this report.

Water transfers were also addressed by the committee with the support of the National Conference of State Legislatures. Though early discussions were based generally on ways to encourage transactions between willing buyers and willing sellers, the discussion later focused on whether or not voluntary water transfers should be a tool for maintaining instream flows or for encouraging improved water use efficiency.

Finally, the appendices contain references for background information and proposed legislation offered by the committee.

## Part One: Areas of Continuing Committee Oversight

Of the four areas addressed in this part, the committee devoted most of its attention to the state water plan and water research. This concentration occurred because new programs or activities were occurring in these areas, thereby requiring more committee attention.

### I. THE STATE WATER PLAN

The Department of Natural Resources and Conservation (DNRC) made state water planning one of its major activities in 1988. Borrowing a framework used by the Kansas Water Office,[2] four areas were selected for study during the 1987-89 interim: water data management, agricultural water use efficiency, instream flow protection, and hydropower licensing. Examination of these areas will result in policy recommendations and possibly legislative proposals for consideration by the 51st Legislature.

In order to fulfill its statutory obligation to analyze and comment on the state water plan, the Water Policy Committee requested periodic updates from the DNRC on progress made in developing plan sections (beginning in February 1988). In addition, two committee members serve on the State Water Plan Advisory Council, which provides direction for the planning process.

#### A. Legislative History of the State Water Plan

The state water plan statute was first enacted in 1967.[3] The initial language is similar to the current statute (section 85-1-203, MCA), except that the then-existing Water Resources Board was directed to formulate the state water plan. In 1974, this authority was attached to the DNRC, though Board of Natural Resources and Conservation approval of the water plan and any revisions to it is required.[4]

The 1985 Legislature made minor revisions to the water plan statute upon the recommendation of the Select Committee on Water Marketing.[5] These revisions direct the DNRC to submit plan sections, amendments, and additions to the Water Policy Committee (in addition to the Legislature), and to consult with and solicit the advice of the committee in preparing the plan.

Beyond the plain wording of the bills, indications of legislative intent for the 1967 legislation and the 1974 amendments are sketchy at best. The 1985 amendments may be explained by the final report of the Select Committee on Water Marketing, which states that "[c]oordination and well-reasoned policies must be developed with the participation of the Legislature, other involved agencies, and the public," and that the "Legislature must understand the context of such actions and

must accept them as integral parts of an overall state water strategy."[6] The report also notes the importance of a state water plan in an interstate setting and states that "if the plain language of section 85-1-203 is applied, Montana does not have a plan."[7]

B. The Plain Language of the State Water Plan Statute

Section 85-1-203, MCA, contemplates three functions: a continuing comprehensive inventory of the water resources of Montana; a comprehensive, coordinated multiple-use water resources plan known as the "state water plan"; and a continuing inventory of the groundwater resources of the state.[8] The first and third functions -- the inventories -- are being addressed through various efforts of the DNRC, the Natural Resource Information System of the Montana State Library, and the Groundwater Information Center of the Montana Bureau of Mines and Geology. The second function -- the state water plan -- is the most-discussed and possibly most significant function in regard to water policy.

The requirements for the state water plan are both procedural and substantive. Procedurally, each plan section must:

* undergo public hearing in the state or in the area encompassed by the plan section; these hearings must be noticed in appropriate newspapers once a week for two consecutive weeks;

* be prepared in consultation with the Water Policy Committee;

* be adopted by the DNRC with the approval of the BNRC;

* be submitted to the Water Policy Committee and to each general session of the Legislature; and

* be published.

Substantively, the plan:

* must be a comprehensive, coordinated multiple-use water resources plan;

* may be formulated and adopted in sections corresponding with hydrologic divisions in the state;

* shall describe a "progressive program for the conservation, development and utilization of the state's water resources;" and

* shall propose the most effective means for applying these resources "for the benefit of the people, with due consideration of alternative uses and combinations of uses."

C. The New State Water Planning Approach

Prior to 1987, the state water planning effort consisted of studies and large-scale basin plans funded substantially by federal money. This work occurred primarily in the late-1970s and early 1980s, and resulted in very limited guidance for agencies. In 1987 the DNRC initiated its present process, which attempts to use planning as a proactive and dynamic problem-solving tool.

The state water planning process is guided by the ten-member State Water Plan Advisory Council (SWPAC), which consists of four executive agency members, four legislative members, and two public citizens, all appointed by the Governor.[9] Its tasks include recommending topics for study and providing ongoing guidance throughout the planning process.

The planning process is still being reviewed and revised. In general, however, the first phase of the process involves issue analysis, beginning with selection of study topics by the SWPAC. Each study topic is addressed initially by a technical advisory committee, which is composed of persons familiar with the topic. With staff support from the DNRC (and, as appropriate, other agencies), the technical advisory committee develops a study plan, reviews a draft background (issue) paper, and makes preliminary recommendations. The issue papers are then refined and forwarded to the SWPAC, along with an executive summary. The SWPAC reviews the issue papers and makes its own preliminary recommendations.

The second phase involves actual plan development. The SWPAC recommendations are summarized and presented with background information in a draft "plan section" for each topic. Upon approval by the SWPAC, the draft plan elements are submitted to public review and comment at public hearings throughout the state.

In the third and final phase, the SWPAC refines its recommendations and distributes revised plan sections for formal public hearing in at least two locations. Then, after a final review, the SWPAC submits the plan elements, along with proposals for legislation, for BNRC approval. Upon approval, final plan sections are formally submitted to the Water Policy Committee and the Legislature, and plan implementation begins.[10]

The planning cycle for the 1987-89 interim will require about one year. As noted earlier, the DNRC also provided periodic updates to the committee and requested and received committee comment.

D. Public Comment on the State Water Plan

Almost 2000 people attended the nine public hearings held in August on the four draft plan elements.[11] Nonetheless, some persons expressed concern over a lack of public involvement in the process, about unbalanced technical advisory committees, and about the process moving too quickly.[12]

Some persons also felt that the DNRC had too much control over the planning process. This may have served as the basis for comments suggesting that the Legislature must play a major oversight role in the water planning process.[13] Other comments include:

* the public meetings were poorly noticed and poorly timed given the drought and agricultural activity in August;

* the water planning process is needed, and cooperation among the various interest groups in the process is necessary;

* as a regulatory agency, the DNRC has an inherent conflict of interest that affects its credibility in the planning process;

* the bottom line of the planning process must be clear recognition and protection of existing water rights;

* the planning process should not proceed until the adjudication is complete;

* the state does not need a water plan or, at least, there is some uncertainty over the need;

* the public is unclear as to the operation and ultimate effect of the state water plan;

* the state water plan should not be a vehicle for addressing major controversies over water; and

* Montanans are very concerned about the management of our water resources.[14]

The comments will lead to some changes in the process. First, the SWPAC has indicated that the planning cycle should be extended to two years for complex issues. Second, efforts will be made to obtain more public participation in the first phase of the planning cycle, in part through development of an expanded mailing list.

E. Policy Choices

Both the planning process and the water plan sections themselves pose policy questions. The options provided below

describe some choices that exist for the planning process. Not addressed are the substantive recommendations associated with the specific plan elements.

1. **Does the committee wish to suggest specific planning efforts?** As stated above, some substantive requirements are in place for the plan. The topics selected by the DNRC/SWPAC have been issue-oriented. Alternatives include:

a. **Recommend that the SWPAC continue to select topics for study.** The SWPAC solicits input from various parties, including agencies and the public, in selecting topics.

b. **Recommend or designate topics for study through the state water plan process.** The committee could suggest, or designate through legislation, topics that it feels might benefit from review under the state water planning process. Alternatively, the committee could request that the DNRC present the preliminary choices for committee review and comment.

c. **Recommend or direct a water development or conservation focus.** The statute contemplates a progressive program of water development, conservation and utilization of the state's water resources as a part of the state water plan. Given this emphasis, the committee could recommend that extensive efforts be undertaken to identify feasible sites for water development and/or conservation efforts. However, the statute also states that the plan should be a comprehensive, coordinated multiple-use water resources plan and that it should propose the most effective means of using water resources "for the benefit of the people."

d. **Other.** For example, the committee could address the level of planning that should occur.

Final recommendation: (a and c) The current process for determining plan topics should be continued, but with expanded effort to obtain public input concerning topic selection. Special consideration should be given to identifying feasible sites for water development, including sites for additional storage and conservation improvements.

2. **To what extent should public input be funneled into the planning process?** In its report to the 50th Legislature, the committee requested that public comment be solicited early and throughout the planning process.[15] As noted earlier, the present process allows for public input at various points, including through public meetings on draft and refined plan elements, limited membership on the SWPAC, and membership on technical advisory committees. Options include:

a. **Recommend continued efforts by the DNRC to involve the public in its planning efforts.** As illustrated by the

turnout at the statewide public hearings, the public is being notified and does have opportunity to comment on the planning documents. Also, the DNRC is reviewing avenues for obtaining public involvement earlier in the planning process.

b. **Recommend expanded membership on the technical advisory committees.** The committees might be expanded to include persons with practical, in addition to technical, background in the topic under consideration. To some extent, the DNRC undertook this approach when it expanded the technical advisory committee on instream flow protection in May 1988.

c. **Recommend more public representation on the State Water Plan Advisory Council.** Currently, the SWPAC has two public members, four legislators, and four executive branch representatives.

d. **Recommend regional meetings of the State Water Plan Advisory Council upon selection of topics for study.** This approach would enable the public to discuss its ideas and/or concerns directly with the advisory body at an early point in the planning cycle. The committee might also consider participating in, or co-sponsoring, the meetings.

e. **Recommend that a member of the State Water Plan Advisory Council attend all public meetings/hearings on the draft plan elements.** This would help ensure that the public has ample opportunity to communicate directly to the SWPAC.

f. **Other.** Other alternatives include 1) emphasize educational activities (through workshops, newsletters, etc.); 2) promote informal meetings with organizations to obtain input and answer questions; and 3) establish regional advisory councils to address the issues.

Final recommendation: (a, c and f) The DNRC should continue to aggressively solicit public participation in all phases of its planning efforts. To ensure formal input in decision making, several public representatives (perhaps six members selected by geographic region) should be considered for membership on the SWPAC. Finally, educational activities, informal meetings with organizations, and regional advisory councils should all be used to ensure ample opportunity for public input in even the earliest stages of plan development.

3. **Should an entity be required to approve the state water plan?** The present statute requires that the DNRC receive approval from the Board of Natural Resources and Conservation (BNRC) prior to adopting the state water plan. At issue is whether the BNRC should retain approval authority, particularly given that 1) the plan is a comprehensive, coordinated multiple use water resources plan involving the jurisdictional authority of the DNRC and other

agencies;[16] 2) the plan appears to be advisory only; and 3) the BNRC is not directly involved in developing the plan elements. Options include:

a. **Retain the status quo.** Section 85-2-113, MCA, grants the Board authority to adopt rules necessary to carry out provisions of the Water Use Act. Removing state water plan approval could be interpreted as undermining the Board's responsibility to ensure that the laws are being implemented properly.

b. **Remove the BNRC approval requirement.** Review by the BNRC might be unnecessary given the advisory status of the plan and the analysis and comment of the Water Policy Committee. A secondary issue is whether or not the DNRC should be required to adopt the plan.

c. **Provide for SWPAC approval.** The DNRC requested and obtained SWPAC approval before releasing the current plan elements. Making SWPAC approval a statutory requirement could be a substitute for approval by the BNRC.

If this option is selected, the SWPAC would require description by statute (see question 5).

d. **Provide for approval by another entity.** Options include requiring approval by:

i. the Governor;

ii. the agency board or commission with principal authority over the subject matter being examined;

iii. the Legislature;

iv. the Water Policy Committee.

Each of these options carries with it legal and practical implications that may require committee consideration.

Final recommendation: For this year's state water plan, the Water Policy Committee will review and comment on the plan sections as approved by the Board. The 1989 Legislature may then by resolution adopt the state water plan sections, stating any conditions, exceptions or additions to the elements within the resolution itself. In future years, other options for obtaining legislative or other approval without BNRC consideration should be explored.

4. **How should policy recommendations, including recommendations for legislation, be addressed?** The Water Policy Committee is consulted periodically (via updates at committee meetings) for

advice. Ultimately, the DNRC may develop legislation through the SWPAC that is submitted directly to the Legislature. At question is to what extent, if at all, the committee wishes to become involved in policy decisions, particularly legislative proposals, prior to a general legislative session. Optional approaches include:

a. **Retain the status quo.** In addition to monitoring by the Water Policy Committee, the Governor has appointed four legislators to the State Water Planning Advisory Council (of which two are Water Policy Committee members). The members serve upon request and at the pleasure of the Governor.

b. **Require that any policy recommendations resulting from the state water planning process be presented to the Water Policy Committee prior to the general session.** This option would ensure that the committee has an opportunity to comment in a timely manner on any final proposals, and would allow amendments prior to submission of bills to the Legislature.

c. **Require that any policy recommendations receive endorsement of the Water Policy Committee before submission to the Legislature.** This approach would ensure a final detailed review by a bipartisan legislative entity. On the other hand, this option could be viewed as an unnecessary intrusion into the powers delegated to the executive branch. An alternative is to require formal action by the committee for or against each policy recommendation.

d. **Other.** For this biennium, the committee may wish to conduct a special meeting during the session to review and comment on any proposals for legislation.

Final recommendation: (b and d) To ensure opportunity for detailed review by the legislative branch, the policy recommendations and proposed legislation resulting from preparation of plan sections should be formally presented to the committee prior to the general session. For this biennium, the committee contemplates a meeting early in the legislative session to review and comment on final plan sections and legislative proposals.

5. **Should the State Water Plan Advisory Council be established or described by statute?** The present SWPAC and its membership are declared by order of the Governor.

a. **No.** The present process appears to work satisfactorily and allows for flexibility.

b. **Yes.** Because of the importance of the state water plan to state water policy, the SWPAC and possibly its membership might be described by statute. The SWPAC's present membership includes four legislative members (bipartisan);

four executive branch representatives; and two public members. Additional options include:

i. increase or decrease the size of the committee;

ii. increase representation from the public;

iii. add federal and/or Indian representation;

iv. provide for election of the chairman;

v. attach the SWPAC to the Governor's Office, perhaps in a manner similar to the Reserved Water Rights Compact Commission;

vi. provide an alternative to appointment of all members by the Governor. For example, the Compact Commission receives appointments from the Governor, the Attorney General, and from the President of the Senate and Speaker of the House of Representatives.

Final recommendation: (a) The planning process should continue for another biennium before a statutory council is considered.

## II. WATER DEVELOPMENT

The 1981 Legislature established Montana's present water development program by passing Senate Bill 409. In terms of project promotion, the program consists of:

* a $1.5 million grant program;

* a small-loan program (less than $200,000) funded by the proceeds of general obligation bonds;

* a major loan program funded by revenue bonds and coal severance tax revenues.[17]

Grants and loans for water development have ranged from municipal water and sewer projects to irrigation rehabilitation projects to state water data projects. In addition, water development special revenue account funds are used to pay for operations of the Montana Water Courts and some DNRC units, and for rehabilitation of state-owned projects.

The principal sources of water development program funding are a 30 percent allocation of Resource Indemnity Trust interest proceeds and a .625 percent allocation of coal severance tax proceeds.

The committee addressed water development in September 1987. Various issues were brought before the committee by presenters

from the Department of Natural Resources and Conservation (DNRC), the Department of Health and Environmental Sciences (DHES), and the U.S. Bureau of Reclamation.[18]

A. Legislative Background for Montana's Water Development Program

Senate Bill 409 represented an attempt "to get the state involved in water development, to promote development of private, local and state water projects, and promote offstream storage, develop recreational use and rehabilitate existing water storage structures."[19] In passing both houses, perhaps the most significant amendment was attached by the House Select Committee on Water. That amendment designated highest priority to water storage projects or activities, except if another project or activity designed to accomplish another objective is demonstrated to be more beneficial to a greater number of people.[20] Since 1981, only minor or technical amendments have been made to the water development program.[21]

The following examples taken from testimony before the Senate Committee on Agriculture, Livestock and Irrigation and the Senate Taxation Committee provide additional indication of the types of projects contemplated under Senate Bill 409:

* construction of offstream or tributary storage;
* development of conservation district reservations;
* state-owned dam rehabilitation;
* recreation projects;
* Indian-state water projects;
* conversion from electric to gravity sprinkler systems;
* saline seep abatement;
* canal lining;
* streambank stabilization;
* rehabilitation of existing irrigation projects;
* development of hydropower.[22]

Thus, this legislative history provides background for the water development program objectives, as stated in section 85-1-603, MCA:

> The department shall administer a water development program to accomplish such objectives as rehabilitation of state-owned water projects and works, promotion of private, local

government, and state water development; development of water-based recreation and the protection of water resources for the benefit of agriculture, flood control, and other uses; development of offstream and tributary storage; and development of state-tribal, state-federal, and state-federal-tribal projects....

## B. Concerns Regarding Montana's Water Development Program

### 1. The Use of Grant Program Funding for General Government Operations

Under the funding mechanisms provided by Senate Bill 409, approximately $1.5 million has been available biennially for water development grants. However, this allocation has been reduced twice by the Legislature. In the June 1986 special session, a diversion of about $500,000 was authorized for general government operations to help meet critical state budgetary needs. Then, the 1987 Legislature utilized water development funding sources to meet budgetary requirements for the 1987-89 biennium. The latter diversion left approximately $90,000 for grant proposals, though carryover funds provided about $600,000 for project funding this biennium.[23]

Of principal concern is the effect that reduced state funding may have on water development. Also, a limited pot of state dollars may raise questions concerning merits of the program itself given costs to the applicant in preparing proposals and to the state in administering the program.

### 2. The Criteria Used to Evaluate Proposals for Water Development Grants

Though actual decisions and final project rankings are made by the Legislature, proposals for water development grants are evaluated by the DNRC according to the following criteria and weights:

| | |
|---|---|
| Benefits the Public | 40 points |
| Need and Urgency Exists | 10 |
| Statewide Application | 5 |
| Not Previously Funded | 5 |
| Does Not Remove Agricultural Land from Production | 5 |
| Provide for Water Storage | 5 |
| Benefits a Family Farm | 5 |
| Uses Reserved Water | 5 |
| | 80 points |

This ranking system has remained largely intact since 1981. However, a two-year preference for agricultural projects -- which was converted to five-points -- was adopted by the 1985 Legislature.[24] While a similar preference was defeated in 1987,

that Legislature did enable the DNRC to hire an employee to provide information for agricultural persons on the water development program; to identify potential agricultural projects and assist in developing applications for those projects; and to assist successful agricultural applicants in implementing project grants.[25]

Most recently, the State Water Plan Advisory Council has discussed and preliminarily recommended a preference for projects that would make existing agricultural projects more efficient.[26]

While agricultural projects have been promoted by the actions discussed above, municipal water and sewer projects, along with public water supply projects, may become even more dependent on water development money. The 1987 Clean Water Act amendments will result in a phase-out of federal grant money (currently at $1.5 million annually) for municipal wastewater treatment facilities.[27] In place of the grant program, the Environmental Protection Agency will administer "seed money" to help capitalize state revolving loan programs. The seed money will be phased-out by 1994.[28] Along with future state costs in implementing the revolving loan program, stricter standards under the Safe Drinking Water Act will require major upgrading of existing public water supply systems. Presently, there is no federal grant program to help fund the needed system improvements.[29]

C. Policy Choices

The following questions address the issues described above.

1. **Should state water development program money be available for general government operations?**

a. **Yes.** This option could be qualified by emphasizing that the money should only be made available if absolutely essential to balancing the general government budget.

b. **No.** A continuing and fully-funded water development program can be viewed as essential to Montana's economy and the well-being of its citizens. Moreover, some water development funds are already used for government programs (e.g., the Montana Water Courts, some DNRC operations).

Final recommendation: (b) The committee is philosophically firm on developing a strong water development program. The continuing decline of money available for the grant program (from $2.1 million in 1983, to $1.6 million in 1985, to $590,000 in 1987, to a proposed estimate of $39,000 in 1989) is objectionable. The committee strongly encourages full funding to ascertain whether the program can achieve the objectives contemplated initially.

2. Should the ranking system for evaluating water development grant proposals be adjusted?

a. **Yes, an agricultural project should receive additional preference.** This option may suggest legislation approximating the amendments considered in 1985 and 1987.

b. **Yes, an agricultural project that results in more efficient water use should receive a preference.** This option encourages agricultural projects but only if they result in more efficient water use. The qualifier might be justified as a "drought-proofing" incentive.

c. **Yes, a project that results in more efficient water use should receive a preference.** The importance of water to Montanans and the recurring water shortages may suggest a need to encourage improved water conservation among all Montana water users.

d. **Yes, a storage project should receive more weight in the ranking process.** The original legislation appears to have contemplated additional storage as a principal reason for a state water development program. Sub-options include providing a preference for off-stream projects, projects on small tributaries, and/or projects with minimal adverse environmental effects.

e. **No, the program is working fairly well and an equitable split among project types seems to be occurring.** This option may be justified by the DNRC's efforts to encourage applications for agricultural projects.

Final recommendation: (e) The water development grant program appears to have criteria in place that reflect the varying needs for water development in Montana.

## III. WATER RESEARCH

"How can water research best serve Montana?" This question was addressed during a university system symposium on water research in June 1988.[30] To some extent, the question has two parts:

How can existing water research resources and levels of commitment be better utilized?

Can an aggressive water research program be developed that truly addresses Montana's water research needs?

The second part suggests a rethinking of existing water research capabilities, and requires a strong commitment to developing a

strategy and implementation schedule that is practical and achievable.

A. The Current Situation

State and federal agencies, along with the university system, all conduct significant water research in Montana[31]. Participants at the June 1988 university research symposium noted, however, that water research in Montana is fragmented and underfunded, and that existing research is often driven by funding entities whose priorities may or may not match Montana's research needs. Perhaps illustrative of the fragmentation is the recent university system effort to establish a regional hazardous substance research center from funding provided by the U.S. Environmental Protection Agency. That effort resulted in three different proposals (in cooperation with various universities from other western and midwestern states) rather than one unified proposal. While this approach enables three "shots" at funding, the cost may be a perception that Montana university system resources will not be fully utilized by any proposal.

The June symposium also resulted in other comments assessing present water research and education efforts. These comments include:

* research targets are not well-defined, though changing issues make setting priorities difficult;

* personnel are available in Montana to conduct quality research;

* the public does not appear to be involved in water research;

* the role of the university system and the Water Center in regard to research is unclear;

* there are missed opportunities in developing specialized water curricula; and

* there are missed opportunities in regard to educating both children and the adult public.[32]

Within the university system itself -- the state's principal source of water researchers -- several independent entities contribute to water research. The various programs and projects include:

* Flathead Lake Biological Station -- a program that addresses Flathead Lake and Flathead basin water quality issues;

* Institute for Chemical and Biological Process Engineering -- an interdisciplinary program that focuses on combining biological and chemical research;

* The Reclamation Research Unit -- a program that examines coal and hard-rock mine reclamation problems;

* 49th Parallel Institute -- an ongoing program that addresses United States - Canada relations, including water issues in the Flathead and Milk river basins;

* Hydrology Division, Bureau of Mines and Geology -- this program, which is affiliated with the Montana College of Mineral Science and Technology, focuses on groundwater research and data collection;

* The Montana Water Resources Center -- a program that sponsors water research with money received through the U.S. Geological Survey, and provides information dissemination and education services.[33]

These and other university water research efforts receive about $2 million annually from a variety of funding sources (mostly out-of-state).[34]

However, the Water Resources Center is the only state entity serving a research coordination function. The Center serves as the Montana institute responsible for coordinating the dispersal of the limited federal water research dollars currently available for general water research (as opposed to money available for specific research programs). With an advisory board comprised of agency, public and university representatives, the Center is probably best situated at present to make recommendations concerning water research. Traditionally, however, the advisory board itself has not served a coordinating function beyond that of recommending projects for Center funding.

Along with other research centers nationwide, Montana's Water Resources Center was authorized and funded by Congress. The most recent enabling legislation -- the "Water Resources Research Act of 1984" -- provides that, subject to approval of the Secretary of Interior, each state may establish a water resources research and technology "institute," center, or equivalent agency. The legislation contemplates that the institutes are to be housed at a land grant college, though the state legislature may designate another institution.[35]

The federal legislation directs that the "institutes" shall:

* plan, conduct, or otherwise arrange for competent research with respect to water resources, including investigations and experiments of either a basic or practical nature, or both; promote the dissemination and application of the results of these efforts; and provide for

the training of scientists and engineers through such research, investigations, and experiments, and

* cooperate closely with other colleges and universities in the State that have demonstrated capabilities for research, information dissemination, and graduate training in order to develop a statewide program designed to resolve State and regional water and related land problems.[36]

The intent and purpose sections of the act note that water of adequate quantity and quality is "essential to national stability and growth, and to the well-being of the people," and urge the nation and the states to "discover practical solutions to water problems" through development of research and education programs.[37]

This federal mandate has met with limited success in Montana, perhaps because of inadequate funding and staffing.[38] Current direct funding for Montana's center consists of an annual state contribution of $15,000 and a contribution of about $100,000 from the U.S. Geological Survey.[39] The Center has a part-time director and also receives some part-time staff assistance from the Montana State University -- Cooperative Extension Service.

B. Water Research Potentials

The Water Policy Committee began its interim review of water research in February 1988. A panel of water research experts discussed the value of water research to Montana and the role water research can play in assisting the Legislature, executive agencies and the private sector.[40] Based on this session, a subcommittee consisting of Senator Esther Bengtson and Representative Robert L. Marks met with Dr. Carrol Krause, Commissioner of Higher Education, to discuss potentials for water research under university system leadership.

In addition to internal meetings, the university system conducted three meetings addressing water research during the spring and summer of 1988: a preliminary discussion in May; a symposium in June; and a tour in July of Montana State University water research facilities. The June symposium, which was the most significant meeting, addressed the following questions:

What should be the goals of water research?

How can the goals be reached?

The discussion of goals resulted in the following goal and sub-goals:

Develop a program which best addresses the short- and long-term needs of the state and the university system. This program should:

* facilitate water research and education among all entities involved in water issues;

* provide greater emphasis on water research and education within the university system;

* provide greater emphasis on applied research and education that benefits Montana's citizens and decision makers;

* coordinate agency information needs.[41]

To achieve this goal, the group made several proposals, including:

* create a policy board to set program goals and priorities;

* establish a technical advisory council to develop background information and research proposals;

* pursue stronger water resource curricula; and

* locate additional funding to facilitate a Center program with areas of excellence.[42]

On October 7, after receiving input from the symposium participants and university system personnel, Dr. Carrol Krause presented a report with program recommendations to the committee.[43] The report stated that "[t]he most successful researchers are those that have established a national or international reputation in a field of specialty that is of interest to one or more of the major funding agencies, such as NSF, EPA, etc."[44] While the report notes that over $2 million is spent for water research each year, most of the money comes from these outside sources.

The university system report acknowledges that the present weakness is in "applied research that is directed toward Montana water problems and issues." To address this weakness, the report proposes that the university system and water agencies work more closely to identify critical issues and to give priorities to those issues. The report cautions, however, that "current resources are not adequate to support the effort necessary to initiate and maintain a research program that meets the needs of the Montana water user community."[45]

The report also states a need for improved information distribution and education, both with the public and in developing a university-level interdisciplinary water resources degree program.

Based on these findings the report proposes to:

1. Establish an Interagency Water Research Policy Advisory Board.

The board would operate under the auspices of the Commissioner of Higher Education and would be staffed by the Water Resources Center. Members would include directors of the Departments of Natural Resources and Conservation, Health and Environmental Sciences, and Fish, Wildlife and Parks; vice presidents of research at the University of Montana, Montana State University and the Montana College of Mineral Science and Technology; legislative representatives of the Water Policy Committee and Long-Range Planning subcommittee; and two private sector representatives.

The board would:

a. set research goals;

b. determine priority research areas, and identify research entities;

c. identify available and potential funding sources;

d. review research programs for consistency with the policy;

e. submit a biennial research plan for funding to the legislature; and

f. serve as an advocate for the research program.

2. Expand the scope of the current Water Center Advisory Committee.

The committee would be asked to:

a. identify research and informational needs;

b. review programs of state agencies and the university system for consistency with those needs;

c. give research priorities according to the needs; and

d. identify areas where coordination could help maximize benefits or conserve resources.

3. Expand the role of the Montana Water Resources Center.

The expansion would be required because the Center would provide staff for the Policy Advisory Board and the Water Center Advisory Committee, and would write biennial plans and reports. In addition, the Center would continue to serve as a clearinghouse (by publishing a newsletter, providing information services, organizing a water forum), and would work to establish training programs for public school teachers and adults.

Finally, the Center would review the potential for a coordinated graduate degree program in water resources with the University of Montana, Montana State University, and the Montana College of Mineral Science and Technology.

To fund this endeavor, existing resources would be employed to finance those parts of the program that are already performed by existing entities and additional funding would be requested from the Legislature for new efforts.

C. Policy Choices

The following questions and options address parts of the approach outlined in the university system report, but present alternatives for committee consideration.

1. **Does the Committee want to endorse the Water Research Policy Advisory Board concept?**

a. **Yes, as described in the university system's report.** The Board's membership and duties are summarized earlier in this report.

b. **Yes, but the Committee recommends that the Commissioner:**

i. Modify the Board's membership by adding more private sector representatives;

ii. Modify the Board's membership in other ways. For example, possible members could include a natural resource representative from the Governor's Office, the Department of State Lands, the U.S. Geological Survey, or the U.S. Bureau of Reclamation.

c. **Yes, but the Commissioner should consider requiring that:**

i. The Board identify both existing water research capabilities and the state's water research needs;

ii. The Board identify funding sources and develop a program for encouraging coordinated university and university/state research proposals to these sources;

iii. The Board develop a detailed strategy for achieving a coordinated water research program, perhaps through a "center of excellence" approach;

iv. The Board initiate efforts to establish a graduate program in water resources management with program specialties that align with the state's long-term research needs;

v. The Board develop a coordinated strategy for public education, utilizing such resources as university researchers, extension service, and state agency personnel;

vi. The Board prepare a written report on its activities and recommendations for submittal to the Commissioner of Higher Education and the Water Policy Committee by September 1, 1990;

vii. Other.

Final recommendation: (b and c) The committee endorses establishment of the Water Research Policy Advisory Board, though the board might be expanded to include three state agency representatives (appointed by the governor), three university system representatives, three legislative members, and three public members.

The committee suggests that the Commissioner of Higher Education assign the Board specific research duties, as stated in the options but with the following modifications:

* the Board should solicit private involvement in preparing and sponsoring project proposals;

* the Board should develop a detailed strategy for achieving a coordinated water research program, although a center of excellence approach should not be part of the strategy at this time;

* a graduate program in water resources management should be considered, but not necessarily initiated;

* private resources should also be utilized in developing a coordinated public education strategy.

Finally, the Board should develop a written report by September 1, 1990.

2. **How should the various efforts be staffed and funded?**

a. **Present staffing and funding should be retained.** A direct contribution of $15,000 annually would be required. In addition, the Water Resources Center is staffed by part-time personnel, including a Director at 0.4 FTE.

b. **Funding should be directed to the office of the Commissioner of Higher Education.** The appropriation could be used to hire a consultant to work with the State Water Research Policy Advisory Board to develop a detailed water research strategy and program schedule (perhaps using a process similar to the water rights adjudication study).

c. **Additional funding should be directed to the Montana Water Resources Center.** The money would be used to enable the Center to address expanded responsibilities, including development of a water research strategy.

d. **Other.** If item (2), (3) or (4) is selected, a source of funding might be recommended (existing funding, RIT, water development, general fund, etc.). Another possibility is to authorize a higher return of indirect costs to the university system, perhaps with a requirement that the return be matched by outside money on a [X:1] basis.

Final recommendation: ((a), with modifications) The present funding of $15,000 annually should be continued. In addition, the committee strongly encourages a university proposal for development of a stronger and more focused water research program, including a strategy for obtaining sufficient funding.

3. **To what extent should public education and graduate training be pursued?** While water research is the principal topic of this report and the committee's interim activity, education was emphasized several times during the interim as a necessary step for translating research results into good water management.

a. **Existing programs are providing adequate educational opportunities, particularly given other education needs and budget constraints.** This option would assume continued education efforts through Montana State University Cooperative Extension Services and maintenance of existing graduate programs.

b. **Public education should be pursued aggressively in cooperation with Montana State University Cooperative Extension Service and state agencies.** Discussions before the committee and also at hearings on the state water plan indicate that the public has a strong interest in water resource management issues. A more coordinated effort among water researchers, extension service, state agencies, and the private sector could enhance water education potentials for the public.

c. **A graduate program in water resources management should be pursued.** The program could be used to develop well-trained professionals and to serve as a nucleus of researchers for expanded research efforts.

d. **Other.** One additional option is to defer recommendations until the State Water Research Policy Board (or the university system) studies this topic and makes recommendations.

Final recommendation: (b) A more coordinated and aggressive educational effort should be undertaken with the Montana State University Cooperative Extension Service, state agencies, and the private sector.

## IV. WATER DATA MANAGEMENT

Water Policy Committee oversight over Montana's water data management efforts is required,[46] at least in part, because reliable and accessible information is necessary for an effective long-term water policy and is important to current and potential Montana water users.[47]

As part of its oversight this interim, the committee requested and received from Sara Parker, the state librarian, a status report on the agency's natural resource data management efforts. Her report also addressed proposals for funding program activities for the next biennium.

### A. The Montana Water Information System

Efforts in the mid- to late-1980s have focused on providing better access to existing data sources as the most cost-effective way to improve Montana's water data base. With help from a Water Policy Committee endorsement last interim, the Natural Resource Information System (NRIS), a program of the Montana State Library, received $97,700 from Water Development Program funds to begin to locate water data sources and provide access to them. Initial "Phase 1" efforts involve finding out specifically what kinds of data are needed and inventorying the locations of existing data that might meet those needs. This "supply and demand" analysis is being accomplished through interviews with individuals of various agencies and organizations. Highest priority will be given to providing access to the most helpful data sources, and system design and operation will be driven by user needs.

Other Phase 1 goals that are being addressed under current funding and will be completed by June 1989 include:

* establish and maintain a central contact point at the Montana State Library from which data users can initiate data searches and retrievals;

* survey other states' information systems (e.g., Idaho, Washington, Mississippi) to determine if they have potential applicability to Montana;

* develop access to other data bases, such as the U.S. Geological Survey's WATSTORE and NAWDEX;

* provide descriptive information on each data source now available to assist users in determining the appropriateness of the data for the need at hand; and

* encourage adoption of and adherence to existing standards for sampling and analysis programs of state agencies, universities and the private sector.[48]

Phase 2 of the study, which begins July 1, 1989, proposes to focus on promoting MWIS use among the entities it is designed to serve and to continually refine the system to keep pace with advances in data management technology.[49] As stated by NRIS:

> MWIS must be viewed as a dynamic program, on the one hand providing a basic level of service consistent with its well-defined mandate and on the other hand providing the flexibility to meet the changing demands and needs of water data users in Montana.[50]

NRIS intends to maintain a technical staff to ensure ongoing expertise in the various data bases and in the design and operation of data retrievals. It also intends to train State Library personnel to lessen dependency on the technical staff for data retrievals, and to offer training to frequent system users to encourage remote and independent use of MWIS. Finally, NRIS will investigate the use of Geographic Information Systems (GIS), along with other data management technologies, in an effort to coordinate data development among water data users and generators in a manner that is compatible with these "state-of-the-art" systems.

B. State Water Plan Recommendations

The State Water Plan Advisory Council has recommended continuation of the program described above. It notes that MWIS "eliminates the duplication of effort by enabling each agency to continue managing its own data to meet its specific needs while allowing for the maximum sharing of water data among participating agencies.[51]" No statutory changes are recommended, but continued legislative funding is termed "critical".[52] The plan element also states that NRIS should continue to investigate user fees as a potential source of partial funding.

C. Proposed Funding Sources

MWIS is largely dependent on grant money for its operation. For the upcoming biennium, the budget is dependent on $36,000 from an NRIS application for Renewable Resources Development Program money, and another $45,000 from the same fund specifically for Phase II activities.

In addition, NRIS has contracted with various entities, including the Bonneville Power Administration; the Department of Health and Environmental Sciences; the Department of State Lands;

and the Department of Fish, Wildlife and Parks to provide data management services. Approximately $25,000 has been obtained during fiscal years 1988 and 1989 for MWIS through these and other interagency agreements. Continued contractual agreements are expected, though it appears unlikely that the program will generate sufficient money to fully cover its costs, at least in the immediate future.

D. Policy Choices

The following options address program development:

a. Recommend continued program development. The funding level requested for the next biennium approximates current funding levels.

b. Recommend reduced program development. Reduced service, particularly in regard to long-term accessing capabilities and system development, would occur.

c. Recommend further study regarding potential funding formats and/or sources. This option could involve an investigation into general fund, user fee and other potentials for long-term funding. Participation by committee member(s), the Legislative Fiscal Analyst, or other persons/entities might be suggested.

d. Recommend NRIS leadership in describing quality assurance/quality control data standards. This option might involve sponsorship of a conference to inventory and describe the data standards used by the various data gatherers.

e. Other.

Final recommendation: (a and c) The NRIS water information system appears to be proceeding on schedule and should be funded as proposed through the 1990-92 biennium. Efforts should be undertaken, however, to investigate long-term funding scenarios.

## Part Two: Areas of Special Study

Two very significant areas of special study were examined by the committee. The first area is the ongoing water rights adjudication process, which is determining all pre-July 1, 1973 water rights. Because of continuing controversy concerning the legal sufficiency of the process, the 1987 Legislature directed the Water Policy Committee to hire a qualified consultant with no conflict of interest to evaluate the process. The consultant's report is available by contacting the Environmental Quality Council office, and the committee's recommendations and proposed legislation are described in the following sections.

The second area concerns water transfers. With support from the National Conference of State Legislatures, the committee examined Montana's current laws and the laws of other western states to attempt to ascertain whether streamlining the existing process -- while protecting rights of other water users -- is feasible or desirable.

### I. WATER RIGHTS ADJUDICATION

The Water Policy Committee's principal agenda item for the 1987-89 biennium was the water rights adjudication process. This focus resulted from a specific legislative appropriation to the committee to hire a consultant with no conflict of interest to review and analyze the water rights adjudication process.

#### A. Background

Montana's water rights adjudication process involves an adjudication of water rights existing prior to July 1, 1973.[53] Initially, this process stressed an administrative evaluation of existing water rights. But because this effort would require an estimated 100 years and $50 million to complete, the Legislature adopted a new system in 1979 to expedite and facilitate the adjudication.

The existing process employs water courts in four water divisions: the Yellowstone River Basin, the lower Missouri River Basin, the upper Missouri River Basin, and the Clark Fork Basin. Each water basin is presided over by a water judge who has the assistance of a water master. The Department of Natural Resources and Conservation (DNRC) assists the courts by providing water rights information, a computer system for storing water rights data, and in-house checks and field investigations for the purpose of examining claims. This relationship, along with operations of the water courts generally, is coordinated by the chief water judge.

The present adjudication process has been upheld as adequate on its face by both federal and state courts.[54] However,

questions concerning the structure and operation of Montana's adjudication process have generated litigation. In mid-1985, litigation brought by the Montana Department of Fish, Wildlife and Parks resulted in a stipulated agreement among the various parties, including the Water Courts and the DNRC. More recently, the Montana Supreme Court has issued three opinions concerning the adjudication process, perhaps the most controversial one concerned whether the DNRC has authority to adopt rules addressing its role in assisting the Water Courts.[55] That litigation slowed adjudication efforts and, perhaps more importantly, resulted in discord among the parties directed by statute to implement the process.

## B. Origin of the Study

During the 1987 legislative session, the Water Policy Committee submitted a bill that designated priority basins for adjudication, broadened the requirements for the position of chief water judge, and also called for a random sample of basins at the temporary preliminary, preliminary, and final decree stages to assess the accuracy of the claims. The bill -- House Bill 754 -- passed but without the controversial random sample provision.

However, amendments submitted during the appropriations process resulted in eventual funding for an examination of the process by a qualified consultant. The following language accompanied the appropriation when it was first proposed in the House of Representatives:

> The water policy committee of the legislature created in 85-2-105 shall contract with a qualified consultant or consultants who have no conflict of interest in the water adjudication process to review, analyze, and comment on the process and results of the process, including but not limited to the various functions carried out by the department of natural resources and conservation, the practice and procedures being implemented by the water judges, and the need for legislative changes, if any.

Though this language does not accompany the final appropriation,[56] the legislative intent appears the same. Thus, the committee undertook this study in an effort to address concerns over the adequacy of the adjudication process, along with a desire to "clear the air" and eliminate the disharmony and discord.[57]

## C. Study Purpose and Consultant Selection

A task force was appointed by Senator Jack Galt, committee chairman, to prepare a Request-for-Proposals (RFP) and to review proposals submitted in response to the RFP.[58] As developed by the task force, the purpose of the adjudication study was to obtain an independent and nonbiased assessment of Montana's water

rights adjudication process that would evaluate whether the process as applied is:

* fulfilling statutory mandates; and

* sufficient to meet federal McCarran amendment (see 43 U.S.C. 666) requirements, Montana state law requirements, and other due process or separation of powers considerations.[59]

Fifteen proposals were received by the committee. The task force selected five of the proposals for consideration by the committee. The five consultants were then interviewed by the committee on September 10, 1987, and the Denver law firm of Saunders, Snyder, Ross & Dickson, P.C., was formally selected the next day.

After signing the contract in October, the consultants' first step was to prepare a study design for review and approval by the committee.[60] With minor modifications, the study design was approved at the committee's December 11 meeting. The consultant proceeded to undertake background research and then formal data collection began in early winter and continued into June 1988. The efforts involved additional legal research; interviews with claimants, water law attorneys and principal actors in the adjudication process; and surveys of claimants and water law attorneys. The information was analyzed during the summer, and a draft report was submitted to the committee on August 1, 1988.

Comments on the draft report were then requested and received from various parties.[61] In response to these comments, the report was revised and submitted to the committee on October 1, 1988.

D. The Report by Saunders, Snyder, Ross & Dickson, P.C.

The report states that the water rights adjudication process is not "so grievously flawed as to require a massive legislative overhaul."[62] Moreover, the report states:

> We conclude that with some minor legislative fine tuning, the process now going forward under that law can be expected to achieve the results sought by the legislature when it adopted Senate Bill 76 in 1979. How rapidly that process can be concluded under the changes we recommend will become a function of the level of funding provided to both the judicial and executive branch institutions involved in the process.[63]

The specific findings include the following:

* the Water Court's directions to the DNRC do not violate the separation of powers doctrine;

* there is no compelling legal requirement for the legislature to reassign some of the multiple functions of the DNRC to another executive branch agency;

* the claims examination process, both prior to and after the Supreme Court rules, is adequate;

* there is no legal problem inherent in the use by the Water Courts of evolving or differing procedures and guidelines in the adjudication process;

* in order to assure binding decrees in individual subbasins, legislation is recommended that would require notice of the decrees throughout the entire river system and would allow for objections to the decrees;

* because the conclusive abandonment statute is both legal and constitutional, the decreeing of late-filed claims should terminate;

* users are not precluded by law from objecting to claims at the preliminary decree stage even where those claims were first evidenced in a temporary preliminary decree;

* the timeline for filing an objection to a claim in a subbasin by an affected water user in another subbasin of the river system should run for at least one year after initial notice; this process will lengthen the timeline for the adjudication process.

* the Water Courts and the DNRC are highly efficient in their roles;

* while credible arguments from both sides have been advanced on the constitutionality of the Water Courts, no compelling reason exists to dismantle or revise the Water Court system;

* the current phase of the adjudication process is adequate to adjudicate federal and tribal claims under the McCarran amendment;

* neither the appropriation doctrine nor the present statutes prescribe a universal, precisely measurable standard of accuracy for the entry of decrees evidencing water rights;

* the final decrees will be useful in the eventual administration of water rights in Montana;

* the final decrees will be useful but not conclusive in equitable apportionment litigation or interstate compact negotiations;

* only final decrees are administrable under the present statutes.[64]

Six legislative proposals are contained in the report. These proposals are described in the options section below.

E. Policy Choices

The options concerning the proposed legislation address unproofed bill drafts prepared for the committee prior to its November 11, 1988 meeting.[65] The drafts are in Montana bill form and make only minor changes to the bills in the study report.

1. **Should the proposed legislation concerning the effect of temporary preliminary decrees be endorsed?** This proposal would state clearly that the Water Courts have authority to issue temporary preliminary decrees in those basins in which adjudication of federal and Indian claims is suspended to allow negotiations undertaken by the Reserved Water Rights Compact Commission. Optional responses include:

a. **No.**

b. **Yes, as generally provided in LC0000001 (November 11, 1988).**

c. **Yes, but with the following changes:**

i. Amend 85-2-233 to allow two 90-day extensions after the initial 180-day notice period;

ii. Make temporary preliminary decrees subject to the provisions of 85-2-233 (the hearings statute);

iii. Provide for notice by publication, instead of personal mail, to those users located outside of the subbasin at issue;

iv. Other.

Final recommendation: (c-i, ii, iii and iv) Temporary decrees should be specifically addressed by statute, with some modifications from the consultant's original bill. First, the extension of the objections period should be limited to two 90-day extensions for good cause shown.

Second, because temporary preliminary decrees may be administrable (see Question 2), an objections and hearings process should be required. However, because objections and hearings will occur at both the temporary preliminary and preliminary decree stages, an objection that seeks to reopen and review any matter already litigated as a result of a previous objection process should not be allowed. The

committee also acknowledges that an amendment may be necessary to provide an exception for federal and Indian reserved rights consistent with the present suspension of the adjudication process for these rights.

Third, the costs of notice by mail are so high as to render basin-wide notice impractical. Newspaper publication will accomplish the same objectives at acceptable costs.

2. **Should the proposed legislation concerning administration of decrees be endorsed?** This proposal would allow for the administration of temporary preliminary and preliminary decrees through the district courts. Optional responses include:

a. **No.**

b. **Yes, as provided by LC0000002 (November 11, 1988).**

c. **Yes, but with the following modifications:**

i. reinstate subsection 85-2-406(2), which allows a petition to the district court for injunctive relief;

ii. eliminate the word "territorial" in describing jurisdiction;

iii. other.

Final recommendation: (c-i and ii) The proposed legislation should be amended to provide for immediate and preliminary injunctive relief, thereby ensuring timely response to water controversies that arise during critical irrigation periods.

3. **Should the proposed legislation concerning changes in water rights be endorsed?** Because final decrees could contain inflated water rights, the report proposes a final check through the change in appropriation right process. If a person seeks to modify his delivery system, a permit from the DNRC -- through the change in appropriation right process -- would be required. Before issuing the permit, however, the DNRC would be required to determine that the change would not result in waste or a stream depletion in excess of the stream depletion caused by the historical beneficial use associated with the right. Optional responses include:

a. **No.**

b. **Yes, as provided in LC0000003 (November 11, 1988).**

c. **Yes, with some or all of the following modifications:**

i. provide for exemption, by rulemaking, of minor changes in facilities;

ii. provide more specific language concerning the types of changes contemplated;

iii. other.

Final recommendation: (a) This legislation is unnecessary, particularly given the fine-tuning recommended in the other proposed legislation. The adjudication process should be relied upon to deliver accurate decreed rights.

4. **Should the proposed legislation authorizing correction of clerical errors in a final decree be endorsed?** The proposed legislation would provide that the water judge may on his own initiative or on the petition of any person who possesses a water right correct clerical mistakes in a final decree. Optional responses include:

a. **No.**

b. **Yes.**

Final recommendation: (b) Correction of clerical errors in final decrees should be authorized by law.

5. **Should the proposed legislation concerning the prima facie status of a claim to be superceded by the issuance of a temporary preliminary or preliminary decree be endorsed?** The prima facie statute would be amended to reflect that, for purposes of water right administration only, the prima facie status of a claim of existing right is superceded by the provisions of a temporary preliminary or preliminary decree. Optional responses include:

a. **No.** This option is particularly applicable if administration of temporary preliminary and preliminary decrees is not allowed (see Question B above).

b. **Yes, as provided by LC0000005 (November 11, 1988).**

c. **Yes, but attach this bill to LC0000002.**

Final recommendation: (c) Because of the close relationship between this bill and the bill providing for administration of decrees, they might be considered as one bill. Also, a claim's prima facie status should not be superceded until the temporary preliminary decree has been modified after objections and hearings.

6. **Should the proposed legislation concerning the reopening and review of decrees be endorsed?** The sixth bill provides for the reopening and review of all decrees. Notice would be given to all persons within the same hydrologically interrelated portion of a water division. An objection to a claim may be filed by any person who possesses a right to use water outside the subbasin where the disputed claim is located, and the water courts may

modify the claim at issue if the evidence before it warrants the change. Optional responses include:

a. **No.** This option would suggest that reopening and review of decrees is unnecessary.

b. **Yes, as provided in LC0000006 (November 11, 1988).**

c. **Yes, but with some or all of the following modifications:**

i. do not allow objections by a person or entity outside the subbasin of the claim at issue if the person or entity also has a claim or other water right within the subbasin;

ii. do not allow objections by federal or state entities;

iii. provide for notice to all Montana persons with rights to water within the stream system (to include those who live outside the water division but within the stream system);

iv. provide two 90-day extension periods for objections;

v. other.

Final recommendation: (c-iii, iv and v) The reopening of decrees is recommended but with a limitation specifying that an objection that seeks to reopen and review any matter previously litigated as a result of an objection process is disallowed. The committee also acknowledges that an amendment may be necessary to provide an exception for federal and Indian reserved rights that is consistent with the present suspension of the adjudication process for these rights.

Two 90-day extension periods for objections are suggested, along with new language ensuring notice by newspaper publication to all persons with rights to water in the stream system.

7. **Should the constitutionality of the Water Court structure be addressed further?** A major issue that emerged from public comment on the draft and final reports concerns the constitutionality of the Water Court structure. Don MacIntyre, author of a law review article on this question, submitted testimony to the committee stating that the Water Courts are not a special court contemplated under the Article VII, section 1 of the Montana Constitution because they are neither an appellate court nor inferior court.[66] As such, Mr. MacIntyre expresses concern that "to hold the Water Courts constitutional under Article VII, section 1 means the legislature would be given

unbridled discretion to carve out courts from existing district court jurisdiction."[67] The consultant's final report finds that credible analyses exists on both sides of the issue, but notes that "courts are traditionally inclined to find laws constitutional if there are rational and credible grounds for doing so."[68] It then concludes that legislative attention is unnecessary. Optional responses include:

a. **No.** The adjudication structure is working acceptably and was developed after extensive deliberation by the Subcommittee on Existing Water Rights in 1977-78.

b. **Yes, the Legislature should consider a bill presenting an alternative structure through the district courts.**

c. **Yes, but the judicial branch should resolve this issue.**

Final recommendation: No formal recommendation is made concerning how, or whether, the constitutionality of the water court structure should be addressed.

8. **Does the committee desire to make recommendations concerning setting priority basins for adjudication?** Section 85-2-218, MCA. provides that the Legislature, or the water judge upon petition by a sufficient number of claimants, may designate priority basins for adjudication. In addition, section 85-2-321 states that highest priority in the adjudication process must be given to issuance of a temporary preliminary decree for the Milk River Basin. Optional responses include:

a. **No.** The Milk River basin priority provides sufficient direction.

b. **Yes, a list of priority basins developed in cooperation with the Water Courts and the DNRC shall be submitted to the Legislature.** The list could be submitted to the legislature as a resolution.

Final recommendation: The committee affirms its support for existing adjudication priorities and the petition process, whereby persons who have filed claims in a basin can petition the water judge for priority adjudication.

9. **Does the committee desire to make recommendations concerning any of the other findings contained in the report?** The report makes several findings and recommendations concerning the adjudication process that do not require legislation. The committee could formally respond to any or all of the findings or recommendations. Optional responses include:

a. **No.** Having fulfilled its obligation to hire a qualified and nonbiased consultant to assess the adjudication process, the committee feels the report should be assessed on its own merit.

b. Yes. The committee may desire to make comment on certain aspects of the adjudication study.

Final recommendation: The committee formally accepts the report by Saunders, Snyder, Ross and Dickson, P.C. on the water rights adjudication process.

The committee is supportive of full funding for the adjudication process, since the level of funding directly affects the rate at which the process can proceed.

## II. WATER TRANSFERS

The Water Policy Committee and the National Conference of State Legislatures co-sponsored a seminar on water transfers in May 1988. Since then, interest in encouraging voluntary water transfers has been stimulated by the 1988 drought and state water planning efforts concerning agricultural water use efficiency and instream flow protection.

### A. Discussion

The transfer of water from one user to another is not new to Montana or the West generally. Most frequently, "transfers" are accomplished with changes in land ownership. In these instances, the water right otherwise remains the same. That is, the new landowner must use the water right for the same use at the same place with the same point of diversion as provided by the previous owner's water right.

A transfer becomes more complex when it involves a different application from that provided for in the original water right. This "change" in appropriation right generally requires agency approval through an administrative review process.

The limitations of western water law in facilitating a transfer with a change in appropriation right have been discussed in at least three contexts. First, existing government review processes, which generally involve opportunity for administrative or judicial hearing, can result in extended timelines and high transaction costs. This effect can discourage transactions between willing sellers and willing buyers in a market-based economy.[69]

Second, transfers of conserved water can promote water use efficiency. A 1987 Western Governors' Association (WGA) study indicates that western water law provides few incentives for water users to conserve water, and in fact may discourage water conservation if "saved" water is later declared to be abandoned or forfeited. The WGA report recommends that laws be amended to facilitate transfers of salvaged water.[70]

Third, existing administrative review processes do not facilitate short-term changes to address drought-related problems. Because these review processes require public notice and opportunity for objection, the change authorization can require several months or more. Moreover, emergency powers to address critical water needs may be limited.

B. Montana's Water Rights Transfer and Change Statutes

The common types of water transfers in Montana are transfers by operation of law and transfers approved by the state for a change in use.[71] A transfer by operation of law occurs automatically when land ownership is transferred, unless the transaction specifically severs the water right from the land.[72] This "water rights transfer" by itself requires only a filing and does not involve substantive administrative review.

The second type of transfer involves a change of use. In this instance, ownership remains the same but the appropriator wants to change the way in which he uses his water right. This "change in appropriation right" could involve a change in place of use, point of diversion, purpose of use, or place of storage.[73]

A hybrid of these two types occurs when the owner is conveying his right to use the water in a different way. This transaction involves both a water right transfer and a change in appropriation right.

The discussion concerning water transfers focuses on the change in appropriation right proceeding. For most change in appropriation right proposals, the appropriator must prove by substantial credible evidence that:

* The proposed use will not adversely affect other water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

* The proposed means of diversion, construction, and operation of the diversion works are adequate.

* The proposed use of water is a beneficial use.[74]

Subsection (a) is the basis of the "no-harm" rule applied by the Department of Natural Resources and Conservation (DNRC) in reviewing change applications. In effect, this requirement means that a change in a water right cannot result in more water being consumed than under the existing use.[75]

Additional review criteria exist for changes involving appropriations of water of 4,000 or more acre-feet of water a year and 5.5 cubic feet per second and for appropriations involving out-of-state water transport. In addition, the

Legislature must approve any change involving the consumption of 4,000 acre-feet or more of water a year and 5.5 cubic feet per second.[76]

The change in appropriation right statute also specifies certain procedural requirements. The statute requires that "[t]he department shall provide notice and may hold one or more hearings upon any...proposed change if it determines that such a change might adversely affect the rights of other persons."[77] A hearing is mandatory for any change involving water use greater than 4,000 acre-feet and 5.5 cubic feet-per-second.

C. Montana Issues

The seminar on water transfers, discussions concerning the state water plan, and the 1988 drought have helped highlight some of the issues relating to water transfers.

1. **Can or Should Montana Encourage Water Transfers to Beneficial Uses that Require Instream Flows?**

At issue with Montana's change in appropriation right statute is the requirement that "[t]he proposed means of diversion are adequate." This requirement on its face appears to imply that a diversion is a prerequisite for a valid change and, therefore, that a change to an instream beneficial use cannot be authorized. On the other hand, another interpretation is that if no diversion is proposed, the adequacy concern is no longer at issue.

A relevant sub-issue is the meaning of "appropriate", defined in 85-2-102, MCA, to mean "to divert, impound, or withdraw (including stock for stockwater) water or, in the case of a public agency, to reserve water in accordance with 85-2-316." In brief, the issue is whether "withdraw" means removal of water from the source, particularly since reservations are available for beneficial uses, or whether it merely means withdrawal from other beneficial uses (thereby not necessarily requiring a diversion).

While the DNRC has issued an administrative decision (Ashley Creek) allowing a change from irrigation use to fish and wildlife use, that change involved a diversion works.[78] A DNRC legal memorandum to the Western Governors' Association states that the diversion question remains unsettled,[79] though the department's state water plan issue paper on agricultural water use efficiency indicates a diversion or impoundment would likely be required except in the case of stockwater withdrawals.[80]

The courts have not addressed this question directly. However, the Montana Water Courts in the "Bean Lake" case found that a diversion was needed to establish a pre-July 1, 1973 water right even though fish and wildlife and recreation qualify as valid beneficial uses.[81] The Montana Supreme Court affirmed the

Water Courts' decision, basing its analysis on an absence of legislative intent to provide appropriative rights for fish and wildlife and recreation uses.[82] At issue is whether these decisions apply only to the issue of whether a pre-July 1, 1973 water right exists, or whether they might be used as support for requiring a diversion in a change proceeding.

Apart from the change in appropriation right statute, those seeking to preserve instream flows could pay an upstream appropriator to refrain from using his allocation during low-flow periods. However, enforcing this "right" against other appropriators may be problematic.

2. **To what extent should short-term transfers to address emergency water needs be encouraged?**

There are two ways by which short-term transfers to address emergency water needs can be facilitated. One way is to modify the water right in advance of the emergency to allow for a short-term water use when flows reach a certain level. The second way is to allow immediate acquisition of water rights when the emergency water shortage occurs.

Montana's laws do not specifically contemplate a dry-year option that would allow a use different from the normal use. Under existing law, these transfers could require two change proceedings: one to initiate the short-term transfer and another to change back to the original use. Or, if notice to other water right holders is the critical concern, it may be possible to process both changes in one proceeding.[83]

As to immediate acquisition of water to address emergency water needs, the Board of Natural Resources and Conservation is required by statute to adopt rules providing for temporary emergency appropriations to protect life or property. A rule has been adopted allowing such appropriations provided a form is completed notifying the DNRC of the emergency appropriation (which may require a diversion) within ten days after the appropriation occurs.[84]

Montana's laws also do not specifically address use of emergency powers to acquire water rights to use to mitigate drought-related problems. However, section 10-3-104, MCA, allows the Governor to suspend agency procedures if strict compliance would "prevent, hinder, or delay necessary action in coping with an emergency or disaster," and section 10-3-311 provides the Governor with authority to expend money (up to $1 million) to address emergency or disaster problems. These laws, along with the temporary emergency appropriation law, could enable the Governor to avoid the change in appropriation rights process for the purpose of using emergency money to acquire water rights from a voluntary seller (though a diversion may be required) or to pay an upstream appropriator to not divert his entitlement. An issue

may be whether low flows can trigger a disaster requiring this emergency action.[85]

3. **Should a water user be allowed to use surplus water obtained from improved efficiency for purposes other than those specified in his water right?**

In the Grether administrative proceeding, the DNRC authorized a change for an agricultural operator who improved irrigation efficiency and sought to apply the salvaged water (i.e., the water that would otherwise be irretrievably lost from the source of supply) to acreage not described in the water right.[86] The DNRC determined that the applicant had salvaged water, and that other appropriators would not be harmed by the change in place of use and point of diversion. Then, based on decisions in other western states and the policy of rewarding appropriators for improved efficiency, it ordered that the old priority date be "bootstrapped" to the new use of the salvaged water.

The DNRC has not explicitly addressed whether approval could be given for a conveyance of salvaged water to another party. Also not addressed is whether the salvage water could be changed to a different use. However, the logic used in Grether suggests the DNRC might authorize these transfers provided the proposed use of the salvage water would not harm other appropriators.

Irrigation districts face an additional problem in that non-surplus water rights may be strictly appurtenant to district lands.[87] Thus, if water is salvaged within a district because of improved efficiency, that water may have to be applied to district lands that have water shortages. Federal laws may also limit use of salvaged water by some districts.

Of factual concern is the extent to which downstream (or down-basin) users may depend on a less efficient use of water. Return flows from the field to the stream are often affected both in quantity and timing when a more efficient application occurs, and this variance can affect other appropriators.

4. **Other Issues**

Two other issues concern Montana's change statute. First, the time needed to process change and permit applications can be lengthy, particularly where the application is contested. This type of issue is being addressed by the DNRC in regard to permit verifications. Second, Montana's change in appropriation right statute provides "public interest" review criteria for large appropriations and out-of-state transfers. The threshold levels for application of the review criteria, along with the criteria themselves, could emerge as issues should a large change in appropriation right or permit application be proposed.

D. Some Practices in Other Western States

1. Do other western states allow water transfers to instream beneficial uses?

Practices vary among the states, as illustrated by the sample below:

a. California courts have ruled against an appropriation where there is no diversion or other physical control over the water, but state statutes require that instream beneficial uses must be considered in evaluating any transfer or new appropriation proposal.[88]

b. In Colorado, private entities may dedicate water rights for instream flow purposes to the Colorado Water Conservation Board, but may not hold rights themselves for these purposes.[89]

c. Nevada allows instream appropriations through the same process as any other appropriation, and Arizona allows private appropriators to acquire instream rights for recreation, wildlife habitat and aesthetic purposes.[90]

d. New Mexico case law and decisions indicate that diversion structures are necessary for water right appropriations.[91]

e. Utah's Division of Wildlife Resources may acquire established water rights to maintain flows for fish habitat, but must have legislative approval for long-term acquisitions.[92]

2. To what extent have other states encouraged short-term transfers to address emergency needs for water?

At least two western states allow changes to address critical needs during periods of drought without extensive administrative review. In Utah, "temporary" changes (i.e., changes that are for a duration of less than one year) are authorized upon determination by the State Engineer that the vested rights of others will not be impaired.[93] Thus, the procedural provisions that exist for permanent change applications (i.e., publication, notice and potential contested case hearing) are bypassed.

Washington recently extended its emergency water transfer statute to allow temporary changes between willing parties without complying with notice and state environmental policy act requirements "when such changes are necessary to respond to emergency water supply conditions as determined by the department of ecology."[94] The Department of Ecology is also authorized to use emergency powers to authorize emergency use of public surface and groundwater, including stored water, provided 1) the water is for a beneficial use, 2) the use does not affect existing water rights, and 3) the withdrawal will not reduce stream flows to

levels that harm fish or governmental navigation interests. The Washington Legislature authorized $3.8 million for loans and grants to facilitate this program.

3. To what extent do other states allow a water right owner to apply salvaged water obtained from improved efficiency for purposes other than those specified in the water right?

Improved efficiency was the principal theme of the 1985 WGA report. The report found that transfers involving salvaged or conserved water "are uncommon in the West partly because of legal and institutional impediments."[95] However, some states have encouraged efficiency by providing for innovative water transfers. Examples include:

a. California has a statutory policy encouraging voluntary water transfers. If a party, by using salvaged water, reclaimed water, or waste water, no longer has a need for certain water in the water right, that part of the right can be transferred to another user without threat of abandonment proceedings. Or, if the party applies technological changes to conserve water, that water can be transferred to water users. Also, the California Department of Water Resources is directed to develop a program to help facilitate water transfers.[96]

b. Oregon has adopted a program allowing transfers of salvaged water, provided up to 25 percent of the amount salvaged is dedicated to the state for instream flows.[97] Oregon requires preparation of a conservation proposal that outlines conservation measures to be taken and quantifies the amount of conserved water expected from the measures. Oregon's Water Resources Commission may approve the proposal if it finds that the proposal is feasible, will produce conserved water, can be effected without injury to existing water rights, and will not adversely affect the public interest.

A general requirement throughout the West is that transfers may not result in harm to other water users.[98] Moreover, several states protect the public welfare either generally or, in some cases, with specific criteria.[99] In Montana, reasonable use/public interest criteria are in place for appropriations larger than 5.5 cubic feet per second and 4,000 acre feet a year, and these and other criteria are applied to out-of-state proposals.[100]

## E. Policy Choices

The options provided below pose policy questions that could be addressed directly by the committee or, in some instances, indirectly through comment on state water plan elements. Another alternative is to defer recommendations until a more thorough study is undertaken.

1. **Should Montana encourage water transfers that allow water users to acquire existing or permitted water rights for instream beneficial uses?**

a. **No recommendation.** Leave existing law unchanged (the effect of this option would probably result in administrative denial of a change application for this purpose).

b. **No.** The change in appropriation right statute could be clarified to clearly reflect this decision.

c. **Yes. State explicitly in the change in appropriation right statute that a diversion is not required for a change authorization.** Existing appropriators, both junior and senior, would continue to be protected from any adverse effects that might be caused by the change. Appropriators who obtain instream flow rights acquired through the change process could, however, object to any future change application and would (like other appropriators) be protected from adverse effects.

d. **Yes, but limit eligible beneficial uses.** For example, Utah limits the instream use to fisheries necessary to preserve valuable fish populations.

e. **Yes, but allow leases only (not total sales).** This approach, which has been preliminarily recommended by the State Water Plan Advisory Council, would preclude the sale of a water right for instream beneficial uses.

f. **If (c), (d), and/or (e) are endorsed, who should have authority to acquire the right through the change in appropriation right process?**

i. any person or entity;

ii. any state or local entity;

iii. any state agency;

iv. the DNRC, the Department of Health and Environmental Sciences and/or the Department of Fish, Wildlife and Parks;

v. a public entity or entities, but with legislative approval for large acquisitions or for long-term acquisitions.

g. **Other.** Alternatives include requesting that the DNRC address this area to the extent authorized under existing law by rulemaking.

Final recommendation: The committee elects not to make specific recommendations concerning water transfers, but notes that at its January meeting it will review and comment on any water transfer bill submitted with the state water plan sections.

2. To what extent should a) short-term transfers and b) emergency transfers be encouraged?

a. Neither short-term transfers nor emergency transfers should be encouraged.

b. Encourage short-term transfers by authorizing dual-purpose and/or dual-owner descriptions in the water right. If this option is recommended, should the owner be able to object to future change proposals on the basis that it would adversely affect the short-term right? Should the owner of the short-term right (the lessee) be able to object to other change applications?

c. Allow short-term transfers between water users with administrative review for adverse effects on other water users, but without publication and notice of the proposal. This option, which parallels Utah's approach, would enable expedited transfers but would retain administrative review for adverse effects. An additional option is to allow this practice only during drought emergencies, perhaps as declared by the Governor by basin.

d. Allow short-term transfers between water users without administrative review, but provide that the parties are liable to other appropriators for any adverse effects resulting from the transfer. This option could be limited to emergency water shortages only (see, e.g., option c).

e. Encourage emergency transfers by recommending that the Governor use emergency powers and money for temporary acquisition of water rights. Alternatively, clarify the Governor's authority in Title 85. Or, provide the DNRC with such authority.

f. Other.

Final recommendation: See the final recommendation for policy choice (1).

3. Should a water user be allowed to use water salvaged by improved water efficiency for purposes other than those stated in the water right?

a. No. If this option is selected, legislative amendments may be needed to address the Grether administrative decision.

b. **Yes, provided other water right holders are not adversely affected.** This option approximates the DNRC interpretation of existing law. A sub-option is to request that the DNRC clarify its interpretation through rulemaking or other means.

c. **Yes, provided a portion of the salvaged water is dedicated for instream purposes.** This option is similar to Oregon's approach.

d. **Yes, and the DNRC should develop a program to promote these practices.** This option may fit with the DNRC agricultural water use efficiency discussions before the State Water Advisory Council. As program options, the DNRC could be directed or asked to:

i. provide a water development program preference for "efficient" irrigation projects;

ii. encourage education efforts through department field offices, conservation districts, and the university extension;

iii. in cooperation with technical persons and farmer irrigators, study and develop cost-effective and efficient irrigation practices and identify areas where improved efficiency is feasible; or

iv. serve as facilitator of water transfers when requested by a willing seller and willing buyer, provided the transfer does not affect other appropriators.

e. **Other.** Another option is clarify, or expand, the authority of irrigation districts to transfer water outside district boundaries.

Final recommendation: See the final recommendation for policy choice (1).

## ENDNOTES

1. Section 82-2-106, MCA.

2. See Kan. Stat. Ann. 82a-903 et seq. The Kansas Water Office is largely a non-regulatory entity within the executive branch of Kansas state government, though it has authority to review actions that would conflict with the state water plan as approved by the legislature.

3. Chapter 158, Montana Laws of 1967.

4. Section 138, Montana Laws of 1974.

5. Chapter 537, Montana Laws of 1985. See Report of the Select Committee on Water Marketing to the 49th Montana Legislature (1985), pages VI-17 to VI-19 and VII-94 to VII-96.

6. Final Report of the Select Committee on Water Marketing, page VI-17.

7. Id. at VI-18.

8. Section 85-1-203(1),(2), and (4), MCA.

9. The members are Larry Fasbender, DNRC (chair); James Flynn, Department of Fish, Wildlife and Parks; Dr. John Drynan (Department of Health and Environmental Sciences); and Howard Johnson (Governor's Office); Sen. Jack Galt; Sen. Bill Yellowtail; Rep. Bob Ream; Rep. Dennis Iverson; Jerry Nypen (Greenfields Irrigation District); and Professor Al Stone (University of Montana).

10. See The Montana State Water Plan: A Handbook on the Process (DRAFT), Montana Department of Natural Resources and Conservation (July 1988), pages 2-12.

11. Review of Public Comments on Draft Sections of the State Water Plan: A Report to the State Water Plan Advisory Council, Montana Department of Natural Resources and Conservation (1988), page 1. The public hearings were held in Kalispell, Missoula, Helena, Bozeman, Billings, Miles City, Glasgow, Great Falls, and Butte.

12. Id., pages 4 through 7.

13. Id., page 5.

14. Id.

15. Montana Water Policy Committee, Report to the 49th Montana Legislature (1987), page 10.

16. Other state entities affected by plan elements prepared so far include the Department of Health and Environmental Sciences; the Department of Fish, Wildlife and Parks; the Federal Energy Regulatory Commission; and the U.S. Bureau of Reclamation.

17. Sections 85-1-605, -606, and -623, MCA.

18. The presenters were Caralee Cheney and Gary Fritz, DNRC; Scott Anderson, DHES Water Quality Bureau; and Don Glaser, Bureau of Reclamation.

19. Senate Committee on Taxation (March 3, 1981). The statement was made by Senator Jack Galt, one of the bill's two sponsors.

20. Minutes of the House Select Committee on Water (March 14, 1981).

21. See Chapter 149, Montana Laws of 1983; Chapter 298, Montana Laws of 1983; Chapter 6, Montana Sp. L. March 2986; Chapter 512, Montana Laws of 1985; Chapter 2, Montana Laws of 1987.

22. See Minutes of the Senate Committee on Agriculture, Livestock and Irrigation, February 18, 1981; and Minutes of the Senate Committee on Taxation, March 3, 1981.

23. Minutes of the Water Policy Committee (September 10-11, 1987), page 2. The minutes summarize statements made by Gary Fritz, DNRC Water Resources Division administrator, to the committee on September 10.

24. Section 17, Chapter 717, Montana Laws of 1985.

25. House Bill 154 (the bill died in House Natural Resources Committee); Minutes of the Water Policy Committee (September 10-11, 1987), page 3. The agricultural promotion description summarizes statements by Gary Fritz to the Water Policy Committee on September 10, 1987.

26. Subsection: Agricultural Water Use Efficiency (Revised Draft), Montana Water Plan Management Section, Montana DNRC (1988), page 3.

27. Public Law 100-4; see Larry Morandi and Tom Hutchison, State Revolving Funds: Financing Clean Water, State Legislative Report, Vol. 12, No. 4 (May 1987), pages 1 - 4.

28. Morandi and Hutchison, page 1. Minutes of the Water Policy Committee (September 10-11, 1987), page 4. The minutes summarize a presentation by Scott Anderson, DHES Construction Grants Program, to the Water Policy Committee.

29. Minutes of the Water Policy Committee (September 10-11, 1987), page 4. The minutes summarize a presentation by Scott Anderson.

30. Montana University System Symposium, Helena, Montana (June 13, 1988).

31. See A Summary of the Discussion at the University System's Symposium on Water Research and Education (June 13, 1988), page 2.

32. Howard Peavy, Summary of Water Research/Education Symposium Comments (September 7, 1988), page 2.

33. See Letter from John Jutila, Vice President for Research at Montana State University, to Rep. Dorothy Bradley and Deborah Schmidt (April 15, 1988).

34. Carrol Krause, Water Research, Information and Education Programs, A Report to the Water Policy Committee of the Montana Legislature (October 7, 1988), page 3.

35. Section 104, 98 Stat. 98. Montana's only land grant institution is Montana State University.

36. Section 104, 98 Stat. 98.

37. Sections 102 and 103, 98 Stat. 97.

38. One concern expressed frequently is the part-time status (.4 FTE) given to the position of Director of the Montana Water Resources Center.

39. The USGS contribution requires a match of 2 state dollars for every 1 federal dollar for the biennium ending September 30, 1989.

40. See John Thorson, Emphasizing Water Research in Montana (June 1988), pages 1 - 5. The panel consisted of Howard Johnson, Governor's Office (moderator); Howard Peavy, Montana Water Resources Center; John Thorson, Doney and Thorson; Rich Moy, Department of Natural Resources and Conservation; and Marvin Miller, Montana Bureau of Mines and Geology.

41. Howard S. Peavy, Summary of Water Research/Education Comments, September 7, 1988.

42. Summary of Water Research/Education Comments, pages 3 - 5.

43. Dr. Carrol Krause, Water Research, Information and Education Programs, A Report Presented to the Water Policy Committee of the Montana Legislature (October 1988). See also Water Policy Committee minutes, October 7, 1988.

44. Water Research, Information and Education Programs, page 3.

45. Id.

46. Section 85-2-105, Montana Code Annotated (MCA).

47. Report of the Select Committee on Water Marketing, 49th Legislature, State of Montana (January 1985).

48. Montana Water Information System, State Water Plan Issue Paper No. 1 (April 15, 1988).

49. Montana Water Information System, State Water Plan Issue Paper No. 1, page 10.

50. Id., pages 10-11.

51. Subsection: Water Information System, Montana Water Plan Management Section, Preliminary Draft (1988), page 3.

52. Id., page 3.

53. See Title 85, chapter 2, part 2 and title 3, chapter 7, Montana Code Annotated.

54. Arizona v. San Carlos Apache Tribe, 463 U.S. 463 (1983), State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 712 P.2d 754 (1985).

55. In Re Activities of the Department of Natural Resources and Conservation, 740 P.2d 1096 (Mont. 1987).

56. House Bill 2, Montana Laws of 1987.

57. Water Policy Committee Request-for-Proposals (July 14, 1987), page 2.

58. Members of the Task Force were Senator Jack Galt, chairman; Representative Gary Spaeth; Representative Dennis Iverson; W.G. Gilbert, Jr., Dillon; Lorents Grosfield, Big Timber; Mike Zimmerman, Montana Power Company; Larry Fasbender, DNRC; Vernon Westlake, Bozeman; W.W. Lessley, Montana Water Courts; and Conrad Fredricks, Big Timber.

59. Request-for-Proposals, page 3.

60. The study design is available by contacting the Environmental Quality Council office, Capitol Station, Helena, MT 59620 (444-3742).

61. The comments on the draft report are available by contacting the Environmental Quality Council office.

62. Saunders, Snyder, Ross & Dickson, P.C. Evaluation of Montana's Water Rights Adjudication Process (September 30, 1988), page 4. A copy of the report can be obtained by contacting the Environmental Quality Council office, Capitol Station, Helena, MT 59620 (444-3742).

63. Id.

64. Id. at 4 through 7.

65. Unproofed Bill Draft Numbers LC0000001 through LC0000006, dated November 11, 1988. The drafts are available by contacting the Environmental Quality Council office. All changes to the proposed legislation in the study report were agreed to by the consultants.

66. Letter by Don MacIntyre to the Water Policy Committee, November 10, 1988. Mr. MacIntyre notes that he is testifying on his own behalf, and not for the DNRC. See also The Adjudication of Montana's Waters -- A Blueprint for Improving the Judicial Structure, 49 Mont. L. Rev. 211 (1988).

67. Id., page 3.

68. Evaluation of Montana's Water Rights Adjudication Process, page 40.

69. See, e.g., Terry Anderson and Donald R. Leal, Going With the Flow: Extending Water Markets, Working Paper 88-6, Political Economy Research Center (1988).

70. Water Efficiency Task Force, Wester Water: Tuning the System, Western Governors' Association (1986), pages 25 to 29. The report was prepared by Bruce Driver.

71. Presentation by Don MacIntyre, Chief Legal Counsel, Montana Department of Natural Resources and Conservation (DNRC) to the Water Policy Committee (May 26, 1988). Water leasing through the DNRC is another alternative.

72. Section 85-2-403, Montana Code Annotated (MCA).

73. Section 85-2-402(2), MCA.

74. Section 85-2-402(2), MCA. Additional criteria are provided for larger appropriations or out-of-state transfers. A DNRC memorandum indicates about 80% of all changes are reviewed solely under the criteria in section 85-2-402(2).

75. Presentation by Don MacIntyre to the Water Policy Committee (May 26, 1988).

76. Section 85-2-402(3),(4), and (5), MCA.

77. Section 85-2-402(6), MCA.

78. In the Matter of Application to Sever or Sell Appropriation Water Right No. 14,607--ss76LJ By Ashley Irrigation District, Montana DNRC, Proposal for Decision (November 21, 1980).

79. Montana Department of Natural Resources and Conservation's Response to the WGA Questionnaire (1985), page 26.

80. Agricultural Water Use Efficiency, State Water Plan Issue Paper Number 3, Montana DNRC (May 20, 1988), pages 28 and 36.

81. In the Matter of the Adjudication of the Existing Rights to the Use of All the Water Both Surface and Underground, Within the Dearborn Drainage Area, Including all Tributaries of the Dearborn River in Cascade and Lewis and Clark Counties, Montana, Case No. 41U-7 (Bean Lake), August 27, 1987.

82. In the Matter of the Adjudication of the Existing Rights to the Use of All the Water Both Surface and Underground, Within the Dearborn Drainage Area, Including All Tributaries of the Dearborn River in Cascade and Lewis and Clark Counties, Montana. Case No. 88-093. Montana Supreme Court (October 19, 1988).

83. Presentation by Don MacIntyre, May 26, 1988; section 85-2-402, MCA.

84. Section 85-2-113(3), MCA; and ARM 36.2.103.

85. Section 10-3-103(3) and (4), MCA, defines "disaster" to mean "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including.....droughts....."; and "emergency" to mean "the imminent threat of a disaster causing immediate peril to life or property which timely action can avert or minimize."

86. In the Matter of the Application for Change of Appropriation Water Right No. 34573 by Carrie M. Grether, Final Order and Memorandum, Montana DNRC (April 27, 1988).

87. See 85-7-305 and 85-7-1911(1) and (3), MCA.

88. Bonnie G. Colby, Instream Flows -- Economic Values and Policy Alternatives, University of Arizona Department of Agricultural Economics (March, 1988), pages 3-4; Cal. Water Code sec. 1243.

89. Instream Flows -- Economic Values and Policy Alternatives, page 4; Col. Rev. Stat. secs 37-92-102(3) and 37-92-103(4).

90. Instream Flows -- Economic Values and Policy Alternatives, page 4.

91. Id.

92. Utah Rev. Code 73-3-3 (1987 Cum. Supp.).

93. Utah Rev. Code 73-3-3 through 73-3-5.5 (1988 Supp.).

94. Chapter 46, Washington Laws of 1988.

95. Western Water Law: Tuning the System, page 10.

96. Presentation by Larry Morandi, Natural Conference of State Legislatures, to the Water Policy Committee (May 26, 1988); Cal. Water Code secs. 1012 through 1014.

97. Presentation by Larry Morandi to the Water Policy Committee. Ore. Rev. Stat. secs. 540.510 et seq.

98. Larry Morandi, Markets and Management: Legislative Options for Water Use Efficiency (Draft report), National Conference of State Legislatures (August 1988), pages 6-7.

99. See Bonnie Colby, Water Markets, State Water Transfer Policies and Economic Consequences, American Bar Association Water Resources Workshop (February 1988) page 10.

100. Section 85-2-402, MCA.

## APPENDIX A: COMMITTEE MEETINGS

### Adjudication Task Force

June 13, 1987 -- Helena
Request-for-proposal

September 14, 1987 -- Helena
Review of proposals

### Water Policy Committee

May 21, 1987 -- Helena
Election of officers
Water adjudication study
Budget

July 9, 1987 -- Helena
Task force RFP
Public Trust Doctrine
Prior appropriation laws

September 20-22, 1987 -- Helena
Water development
Adjudication study interviews
Selection of consultant

December 11, 1988 -- Helena
Water research

February 26, 1988 -- Helena
Water research
Water planning
Water adjudication

May 26-27, 1988 -- Helena
Water adjudication
Water transfers
Water plan

August 29, 1988 -- Helena
Draft adjudication report
Structure of water courts

October 7, 1988 -- Helena
Final adjudication report
Water research
Drought
Water transfers

November 9, 1988 -- Billings
Public hearing on final adjudication report

November 10, 1988 -- Helena
Public hearing on final adjudication report

November 11, 1988 -- Helena
Final adjudication report
Water plan
Research topics

December 2, 1988 -- Helena
Water adjudication
Preliminary recommendations to Legislature
Water transfers

## APPENDIX B: PROPOSED LEGISLATION

The following bills are drafts only. The final committee bills, as provided in the report, will reflect suggestions of committee members and any modifications made during the Legislative Council review process.

wpc1/lc683

*** Bill No. *****
Introduced By **********
By Request of *********

A Draft for a Bill Entitled: "An Act PROVIDING CLEAR AUTHORITY FOR THE ISSUANCE OF TEMPORARY PRELIMINARY DECREES IN THOSE BASINS IN WHICH ADJUDICATION OF CLAIMS FOR FEDERAL OR INDIAN WATER RIGHTS IS PRECLUDED BY THE SUSPENSION OF THE ADJUDICATION UNDER 85-2-217; PROVIDING FOR OBJECTIONS AND HEARINGS ON TEMPORARY PRELIMINARY DECREES; AMENDING SECTIONS 85-2-231, 85-2-232, AND 85-2-233, MCA; AND PROVIDING AN EFFECTIVE DATE."

Be it drafted for sponsor approval . . . . . .

**Section 1.** Section 85-2-231, MCA, is amended to read:

"85-2-231. ~~Preliminary~~ Temporary preliminary and preliminary decree. (1) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

(a) the statements of claim before the water judge;

(b) the data submitted by the department;

(c) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

(d) any additional data obtained by the water judge. The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible. This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree, as provided in subsection (5) or pursuant to 85-2-321, or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

(2) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

(3) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact

negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency.

(4) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (3), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

(5) In any basin in which adjudication of claims for federal or Indian water rights is precluded by the suspension of adjudication under 85-2-217, the water judge may issue a temporary preliminary decree in accordance with the requirements of this section. The temporary preliminary decree shall address all claims in the basin except those affected by the suspension required by 85-2-217.

(6) The water judge shall use a temporary preliminary decree issued under subsection (5) in issuing the subsequent preliminary decree, which, when issued, shall supercede and replace the temporary preliminary decree."

**Section** 2. Section 85-2-232, MCA, is amended to read:

"85-2-232. Availability of temporary preliminary or preliminary decree. (1) The water judge shall send a copy of ~~the~~ any temporary preliminary decree or preliminary decree issued for a subbasin to the department, and the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to each person who has filed a claim of existing right within the subbasin and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which a claim of existing right has been filed within the subbasin or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a beneficial water use permit pursuant to Title 85, chapter 2, part 3, those granted a reservation pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the temporary preliminary decree or preliminary decree. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(2) Notice of the availability of a temporary preliminary decree or preliminary decree must also be published at least once in each week for three consecutive weeks in at least three newspapers of general circulation, which in total cover the water division or divisions in the general stream basin in which the subbasin is located.

~~(2)~~ (3) Any person may obtain a copy of the temporary preliminary decree or preliminary decree upon payment of a fee of $20 or the cost of printing, whichever is greater, to the water judge.

**Section 3.** Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on temporary preliminary or preliminary decree. (1) ~~Upon objection to the~~ For good cause shown, a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by the department~~,~~; a person named in the temporary preliminary decree or preliminary decree~~, or~~; any ~~other~~ person~~, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.~~ within the subbasin entitled to receive notice under 85-2-232~~,~~; or any other person claiming rights to the use of water from sources in other subbasins that are hydrologically connected to the sources within the subbasin who, if that person's claim or claims were from sources within the subbasin in which the decree was issued, would be entitled to receive notice under 85-2-232. However, no objection seeking to reopen and review any matter previously litigated and resolved as the result of any previous objection process is allowed.

(2) If a hearing is requested, such request must be filed with the water judge within ~~90~~ 180 days after notice of entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause shown, extend this time limit ~~an~~ up to two additional 90 ~~days~~ day periods if application for ~~the~~ an extension is made within ~~90~~ 180 days after notice of entry of the temporary preliminary decree or preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the

tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection.

**Section 4. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**Section 5. Applicability.** [This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act].

**Section 6. Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], [LC684], [LC685], and [LC686]; or

(2) a final determination of failure to receive passage and approval of [LC684], [LC685], and [LC686].

-END-

wpc1
Machine ID WPC/EQC

wpc2&5/lc684

*** Bill No. *****
Introduced By **********
By Request of *********

A Draft for a Bill Entitled: "An Act PROVIDING FOR ADMINISTRATION OF TEMPORARY PRELIMINARY AND PRELIMINARY DECREES BY THE DISTRICT COURTS; PROVIDING THAT, FOR PURPOSES OF ADMINISTERING WATER RIGHTS, THE PRIMA FACIE STATUS OF A CLAIM IS SUPERCEDED BY THE ISSUANCE OF A TEMPORARY PRELIMINARY DECREE AS MODIFIED AFTER OBJECTIONS AND HEARINGS OR A PRELIMINARY DECREE; AMENDING SECTIONS 3-7-201, 3-7-211, 3-7-212, 3-7-501, 85-2-227, 85-2-406, AND 85-5-101, MCA; REPEALING SECTION 3-7-213, MCA; AND PROVIDING AN EFFECTIVE DATE."

Be it drafted for sponsor approval . . . . . .

**Section 1.** Section 3-7-201, MCA, is amended to read:

"3-7-201. Designation of water judge. (1) A water judge shall be designated within 30 days after May 11, 1979, for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. Except as provided in subsection (2) ~~and 3-7-213~~, a water judge must be a district judge or retired district judge of a judicial district wholly or partly within the water division.

(2) A district judge or retired district judge may sit as a water judge in more than one division if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit.

(3) A water judge, when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water division."

**Section 2.** Section 3-7-211, MCA, is amended to read:

"3-7-211. Appointment of water commissioners. The ~~water judge of each water division~~ district court having jurisdiction over the subbasin in which the controversy arises may appoint and supervise a water commissioner as provided for in Title 85, chapter 5."

**Section 3.** Section 3-7-212, MCA, is amended to read:

"3-7-212. Enforcement of ~~final decree~~ decrees. The ~~water judge of each water division~~ district court having jurisdiction over the subbasin in which a controversy arises may enforce the provisions of a final decree issued ~~in~~ for that ~~water division as provided in 85-2-234~~, subbasin or, in the absence of any final decree having been issued, the provisions of a temporary preliminary decree or preliminary decree entered under 85-2-231."

**Section 4.** Section 3-7-501, MCA, is amended to read:

"3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised exclusively by it through the water

division or water divisions that contain the judicial district wholly or partly.

(2) No water judge may preside over matters concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified in 3-7-102 for his division except as provided in 3-7-201 ~~and 3-7-213~~.

(3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under 85-2-309 or concerning the determination and interpretation of existing water rights within his division as specified in 3-7-102 that are considered filed in or transferred to a judicial district wholly or partly within the division."

**Section 5.** Section 85-2-227, MCA, is amended to read:

"85-2-227. Claim to constitute prima facie evidence. For purposes of adjudicating rights pursuant to this chapter, ~~A~~ a claim of an existing right filed in accordance with 85-2-221 constitutes prima facie proof of its content until the issuance of a final decree. For purposes of administering water rights, the provisions of a temporary preliminary decree, as modified after objections and hearings, or a preliminary decree shall supercede a claim of existing right until a final decree is issued."

**Section 6.** Section 85-2-406, MCA, is amended to read:

"85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant ~~such~~ injunctive ~~or other~~ relief which is necessary and appropriate to preserve property rights or the status quo pending ~~the issuance of the final decree~~ resolution of the controversy under subsection (3).

3) A controversy between appropriators ~~from a source which has been the subject of a general determination of existing rights under part 2 of this chapter~~ shall be settled by the district court ~~which issued the final decree~~ having jurisdiction over the subbasin in which the controversy arises. The order of the district court settling the controversy may not alter the existing rights and priorities established in ~~the~~ a temporary preliminary decree, preliminary decree, or final decree entered under part 2 of this chapter, but shall refer to the appropriate water court any portion of the controversy involving the nature of existing rights and priorities established in a temporary preliminary decree or preliminary decree. Upon referral back from the water court, the district court shall enter an order that it determines to be consistent with the resolution of the

referred issues by the water court. In resolving the controversy, the district court may alter rights and priorities contained in a final decree based upon abandonment, waste, or illegal change of right. In cases involving permits issued by the department, neither the water court nor the district court may ~~not~~ amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in ~~the~~ a final decree entered under part 2 of this chapter. The order settling the controversy shall be appended to the ~~final~~ decree, and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

**Section 7.** Section 85-5-101, MCA, is amended to read:

"85-5-101. Appointment of water commissioners. (1) Whenever the rights of persons to use the waters of any stream, ditch, or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a cout of competent jurisdiction, it shall be the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights affected by the decree, in the exercise of his discretion, to appoint one or more commissioners. The commissioners shall have authority to admeasure and distribute to the parties owning the rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates and permits issued under chapter 2 of this title. When petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected and they are unable to obtain the water to which they are entitled, the judge of the district court having jurisdiction may, in his discretion, appoint a water commissioner.

(2) When the existing rights of all appropriators from a source or in an area have been determined in a temporary preliminary decree, preliminary decree or final decree issued under chapter 2, the judge of the district court shall upon application by the department of natural resources and conservation appoint a water commissioner. The water commisssioner shall distribute to the appropriators, from the source or in the area, the water to which they are entitled.

(3) The department of natural resources and conservation or any person or corporation operating under contract with the department or any other owner of stored water may petition the court to have such stored waters distributed by the water commissioners appointed by said court. The court may thereupon make an order requiring the commissioner or commissioners appointed by the court to distribute such stored when and as released to water users entitled to the use thereof.

(4) At the time of the appointment of such water commissioner or commissioners, the district court shall fix their compensation, and the owners and users of the distributed waters,

including permittees and certificate holders, shall pay their proportionate share of such fees and compensation.

(5) Upon the application of the board or boards of one or more irrigation districts entitled to the use of water stored in a reservoir which is turned into the natural channel of any stream and withdrawn or diverted at a point downstream for beneficial use, the district court of the judicial district wherein the most irrigable acres of the irrigation district or districts are situtated may appoint a water commissioner to equitably admeasure and distribute such stored water to said irrigation district or districts from the channel of the stream into which it has been turned. A commissioner appointed under this subsection has the powers of any commissioner appointed under this chapter, limited only by the purposes of this subsection. His compensation is set by the appointing judge and paid by each district and other users of stored water affected by the admeasurement and distribution of such stored water. In all other matters the provision of this chapter apply so long as they are consistent with this subsection."

**Section 8. Repealer.** Section 3-7-213, MCA, is repealed.

**Section 9. Saving clause.** [This act] does not affect rights and duties that have matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

**Section 10. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**Section 11. Applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act].

**Section 12. Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], [LC683], [LC685], and [LC686]; or

(2) a final determination of failure to receive passage and approval of [LC683], [LC685], and [LC686].

-END-

wpc4/lc685

*** Bill No. *****
Introduced By **********
By Request of *********

A Draft for a Bill Entitled: "An Act PROVIDING FOR CORRECTION OF CLERICAL MISTAKES IN A FINAL DECREE BY THE WATER JUDGE; AMENDING SECTION 85-2-234, MCA; AND PROVIDING AN EFFECTIVE DATE."

Be it drafted for sponsor approval . . . . . .

**Section 1.** Section 85-2-234, MCA, is amended to read:

"85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree without alteration unless an objection is sustained pursuant to 85-2-233; provided that the court may not alter or amend any of the terms of a compact except with the prior written consent of the parties in accordance with applicable law.

(3) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right, of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, and of any federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file claims.

(4) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

(5) For each person who is found to have an existing right arising under the laws of the state of Montana, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water included in the right, as follows:

(i) by flow rate for direct flow rights, such as irrigation rights;

(ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not susceptible to measurement by flow rate; or

(iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate to adequately administer the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

(6) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree shall state:

(a) the name and mailing address of the holder of the right;

(b) the source or sources of water included in the right;

(c) the quantity of water included in the right;

(d) the date of priority of the right;

(e) the purpose for which the water included in the right is currently used, if at all;

(f) the place of use and a description of the land, if any, to which the right is appurtenant;

(g) the place and means of diversion, if any; and

(h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702.

(7) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge or on the petition of any person who possesses a water right. The water judge shall order the notice of any correction proceeding as he determines to be appropriate to advise all persons who may be affected by the correction. An order of the water judge making or denying a clerical correction is subject to appellate review.

**Section 2. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**Section 3. Applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to all final decrees that have been issued by the Montana water courts and prospectively to all final decrees issued on or after [the effective date of this act].

**Section 4. Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], [LC683], [LC684], and [LC686]; or

(2) a final determination of failure to receive passage and approval of [LC683], [LC684], and [LC686].

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wpc6/lc686

*** Bill No. *****
Introduced By **********
By Request of *********

A Draft for a Bill Entitled: "An Act STATING THAT THE WATER COURTS SHALL BY ORDER REOPEN AND REVIEW ALL TEMPORARY PRELIMINARY DECREES, PRELIMINARY DECREES, AND FINAL DECREES ACCORDING TO CERTAIN PROCEDURES AND LIMITATIONS; AND PROVIDING AN EFFECTIVE DATE."

Be it drafted for sponsor approval . . . . . .

**Section 1.** Reopening and review of decrees. Within 180 days following [the effective date of this act], the water judges shall by order reopen and review, within the limits set forth by the procedures described in this section, all temporary preliminary, preliminary, or final decrees that have been issued by the water courts prior to [the effective date of this act].

(2) Each order shall state that the water judge will reopen and, upon a hearing, review the water court's determination of any claim in the decree or decrees upon the filing of an objection for the purpose of protecting rights to the use of water from sources within the subbasin in which the decree was entered as well as rights to the use of water from sources in other subbasins that are hydrologically connected to sources within the subbasin in which the decree was entered. However, no objection seeking to reopen and review any matter previously litigated and resolved as the result of any previous objection process is allowed. The objection must be made with the same specificity as required for the filing of objections under 85-2-233.

(3) The water judges shall serve notice of the entry of the order providing for the reopening and review of a decree to the department and to the same persons entitled to receive service of notice under 85-2-232.

(4) Notice of the reopening and review of a temporary preliminary, preliminary, or final decree must also be published at least once in each week for three consecutive weeks in at least three newspapers of general circulation, which in total cover the water division or divisions in the general stream basin in which the subbasin is located.

(5) No objection may cause a reopening and review of a claim unless the objection is filed with the appropriate water court not later than 180 days after the issuance of the order under subsection (1). This period of time may, for good cause shown, be extended by the water judge for up to two 90-day periods if application for an extension is made within 180 days after entry of the order under subsection (1).

(6) The water judge shall notify the claimant of the timely objection to his claim, and after further reasonable notice to

both the claimant and the objector, set the matter for hearing. The water judge may conduct individual or consolidated hearings, and any hearing must be conducted according to the Montana Rules of Civil Procedure. On the order of the water judge, a hearing may be conducted by a water master, who shall prepare a report of the hearing as provided in Rule 53E, Montana Rules of Civil Procedure.

(7) The water judge shall, on the basis of any hearing held on the matter, take action as warranted from the evidence before him, including dismissal of the objection or modification of the portion of the decree describing the contested claim.

(8) An order or decree modifying a previously issued final decree as a result of procedures described in this section may be appealed in the same manner as provided for an appeal taken from a final order of a district court.

(9) An order or decree modifying a previously issued temporary preliminary decree or preliminary decree as a result of procedures described in this section may be appealed under 85-2-335 when the temporary preliminary or preliminary decree has been made a final decree.

**Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2 apply to [section 1].

**Section 3. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**Section 4. Applicability.** [This act] applies retroactively, within the meaning of 1-2-209, to all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the Montana water courts prior to [the effective date of this act]. [This act] does not apply to a temporary preliminary decree, preliminary decree, or final decree issued on or after [the effective date of this act].

**Section 5. Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], [LC683], [LC684], and [LC685]; or

(2) a final determination of failure to receive passage and approval of [LC683], [LC684], and [LC685].

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